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No. .....

In The

Supreme Court of the United States

October Term, 1987

CHRISTINA KONIZESKI, et al.,

Petitioners

vs.

LIVERMORE LABS, et al.,

Respondents

ALICE P. BROUDY,

Petitioner

vs.

UNITED STATES OF AMERICA,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether 42 U.S.C. § 2212, whose purpose and effect is to allow the United States to be substituted as the sole defendant in place of private parties in pending lawsuits and thereby to obtain dismissals benefiting the private parties and the United States, is unconstitutional as a violation of separation of powers.

2. Whether 42 U.S.C. § 2212 is unconstitutional as a taking of property in violation of the Fifth Amendment.

3. Whether the discretionary function exception to the Federal Tort Claims Act, 28 U.S.C. § 2680(a), immunizes the United States from liability for negligence in the routine implementation of the nuclear weapons atmospheric testing program, and for the failure to issue post-discharge warnings to servicemen exposed to radiation during the testing program.

PARTIES TO THE PROCEEDINGS[1]

PETITIONERS:

Christina Konizeski; Robert Konizeski; Dale Robert Beaman, Sr.; Douglas Beaman, a minor, through his guardian ad litem, Dale Robert Beaman, Sr.; Jessie Sanders; Janet Funk; Richard Sanders; Kenneth Sanders; Doris L. King; Thomas F. King; Ernestine Saraiva; James Saraiva; Marjorie Saraiva; Nicola Saraiva; Joseph Saraiva; Marbelle Stephens; Diane Stephens Florence; Steven Stephens; Margery Jeanne Williams, individually and as Administratrix of the Estate of Buckey Dale Williams, deceased; Helen Benson; Josephine M. Solano; Isabel Blake; Natalie Estes; Harry Estes; Don E. Cordray; Roger Cordray; Phyllis G. Carsillo; Phyllis A. Carsillo; Kit Carsillo; Carol Craig; Francis Ferguson; Donald Ferguson; Barbara Ann Dixon; Barbara Jeanne Dixon; Don Stephen Tarvid III; Michael Joseph Tarvid; Nicholas Scott Tarvid, a minor, through his guardian ad litem, Barbara Ann Dixon; Margaret Howe Collins; Irma Molsbergen; Mary T. DeMuth, Administratrix of the Estate of Albert A. DeMuth, deceased; Mildred VanWinkle; Thelma E. Porambo; Georgina Fassett; Michael J. Fassett and Jennifer A. Fassett, minors, through their guardian ad litem, Georgina Fassett; Jeanne Fond; Felice Fond; Daryn Fond; Victoria Fond; Anthony B. Fond, a minor, through his guardian ad litem, Jeanne Fond; Berneice Paskett; Barbara Jo-Ann Gray; Sandra May Tillman; Ronald Charles Paskett; Chloe-Alexa Milne; George Alexander Milne IV; Mary Elizabeth Milne; David Edmond Olds Rath; Donna Smith Harrison, individually and as a personal representative of Donald R. Smith on behalf of the heirs of Donald R. Smith; Katherine W. Smith and Sharon D. Smith; Grace Hoffmeister; Alice P. Broudy; Isabel F. Blake; Anthony Guarisco; Harry Green; Foddie Lee Green; Jean A. Erspamer, Executrix of the Estate of Ernest G. Erspamer, deceased; Jean A. Erspamer, individu-

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[1]Parties before the Court and parties to the proceedings in the Court of Appeals for the Ninth Circuit are identical.

ally and as a personal representative of Ernest G. Erspamer on behalf of the heirs of Ernest G. Erspamer, Daniel F. Erspamer; David M. Erspamer; Gordon P. Erspamer; Michael O. Erspamer; Paul M. Erspamer; Peter R. Erspamer; Roy C. Erspamer; and Martin C. Erspamer; Pat Lee Hinkle.

RESPONDENTS:

United States of America; Sandia Corporation; The Regents of the University of California; Reynolds Electrical and Engineering Co., Inc.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioners Christina Konizeski, Alice P. Broudy, and seventy-seven others petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in these consolidated cases.

OPINIONS BELOW

The opinion of the court of appeals (App. 1-41) is reported at 820 F.2d 982 (9th Cir. 1987). The opinion of the District Court for the Northern District of Cali-

fornia in *In re Consolidated United States Atmospheric Testing Litigation* (App. 42-89) is reported at 616 F. Supp. 759 (N.D. Cal. 1985). The unpublished memorandum of decision and order of the District Court for the Central District of California in *Broudy v. United States* is reproduced at App. 90-95.

JURISDICTION

The judgment of the court of appeals was entered on June 22, 1987. A timely petition for rehearing and suggestion for an en banc review was denied on August 25, 1987. App. 96-97. On November 19, 1987, Justice O'Connor granted an extension for filing a petition for writ of certiorari to December 8, 1987. The jurisdiction of this Court rests upon 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Article I, Section 1, of the Constitution provides in pertinent part:

> "All legislative Powers herein granted shall be vested in a Congress of the United States . . . ."

Article III, Section 1, of the Constitution provides in pertinent part:

> "The judicial Power of the United States, shall be vested in one Supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish."

The Fifth Amendment to the Constitution provides in pertinent part:

> "[N]or shall private property be taken for public use, without just compensation."

42 U.S.C. § 2212(a) and (b) provide:

> "(a) Federal remedies applicable; exclusiveness of remedies; Federal employee status; procedure, limitations, and exceptions applicable
>
> "(1) The remedy against the United States provided by sections 1346(b) and 2672 of Title 28, or by the Act of March 9, 1920 (46 U.S.C. 741-752 and 781-790), as appropriate, for injury, loss of property, personal injury, or death shall apply to any civil action for injury, loss of property, personal injury, or death due to exposure to radiation based on acts or omissions by a contractor in carrying out an atomic weapons testing program under a contract with the United States.
>
> "(2) The remedies referred to in paragraph (1) shall be exclusive of any other civil action or proceeding for the purpose of determining civil liability arising from any act or omission of the contractor without regard to when the act or omission occurred. The employees of a contractor referred to in paragraph (1) shall be considered to be employees of the Federal Government, as provided in section 2671 of Title 28, for the purposes of any such civil action or proceeding; and the civil action or proceeding shall proceed in the same manner as any action against the United States filed pursuant to section 1346(b) of such Title and shall be subject to the limitations and exceptions applicable to those actions.
>
> "(b) Delivery of process to Attorney General; removal of cases from State courts; certification of contractor status

> "A contractor against whom a civil action or proceeding described in subsection (a) of this section is brought shall promptly deliver all processes served upon that contractor to the Attorney General of the United States. Upon certification by the Attorney General that the suit against the contractor is within the provisions of subsection (a) of this section, a civil action or proceeding commenced in a State court shall be removed without bond at any time before trial by the Attorney General to the district court of the United States for the district and division embracing the place wherein it is pending and the proceedings shall be deemed a tort action brought against the United States under the provisions of section 1346(b), 2401(b), or 2402, or sections 2671 through 2680 of Title 28. For purposes of removal, the certification by the Attorney General under this subsection establishes contractor status conclusively."

The full text of 42 U.S.C. § 2212 is reproduced at App. 98-100.

STATEMENT

This petition arises out of consolidated actions for personal injury and wrongful death involving twenty-nine individuals who were exposed to significant doses of radiation as a result of atmospheric testing of nuclear weapons by the United States between 1946 and 1962. Twenty-four of the individuals were members of the United States Armed Forces at the time of their exposure; four individuals were civilians; one individual participated in three test

series as a serviceman and in one series as a civilian.[2] Each of the individuals in whose behalf this petition is brought have suffered serious illness. Only three are alive today. The others have died of cancer or cancer-related causes.

The original defendants in these suits were three contractors who played a scientific and technical role in the United States' nuclear weapons testing program. Defendant Regents of the University of California operated the Los Alamos Scientific Laboratory and the Lawrence Livermore Laboratory (formerly University of California Radiation Laboratory), and was responsible for the development and implementation of radiation safety procedures at each of the tests. Defendant Sandia Corporation, a nonprofit subsidiary of Western Electric, member of the A.T.&.T. corporate network, provided ordinance engineering for the weapons program. Defendant Reynolds Electric Engineering Company was responsible for maintenance, operation and construction of the Nevada Test Site, where ten test series were conducted between 1946 and 1962.[3]

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[2]In addition three other individuals are servicemen who were exposed to radiation as a result of the bombing of Hiroshima and Nagasaki. A table showing the names and dates of the test series in which exposure occurred appears in the memorandum of opinion and order in the Northern District consolidated cases at 616 F. Supp. at 761 nn. 1, 2. App. 42-44. For convenience the term "Petitioners" herein will refer to the individuals whose radiation exposure and subsequent illness or death is the subject of this petition—whether such individuals are technically Petitioners or their decedents.

[3]The United States was also named as a defendant in some of the original suits, principally on grounds that it had failed to issue proper post-discharge warnings to servicemen exposed to radiation during the test program. Issues concerning the failure to warn are addressed briefly at p. 28, *infra*.

These contractors and their predecessors entered into contracts with the United States Government during and after World War II, under which they assisted in developing and testing nuclear weapons. From the beginning, it was recognized that such work entailed significant risks, and that lawsuits might be filed against the contractors as a result of their work. Therefore, each of the contractors entered into indemnification agreements with the Government under which the United States agreed to indemnify the contractors fully for any costs, including attorneys' fees and damage judgments, of suits against them. Between 1946 and 1963, the United States with the assistance of the private contractors conducted twenty-one series of atmospheric tests in which 235 separate nuclear "devices" were detonated, beginning with two explosions at Bikini Atoll in 1946 and ending when the United States entered into the Partial Nuclear Test Ban Treaty in 1963.

Between 1981 and 1984, Petitioners filed actions in state and federal court against the contractors and the United States. The various actions in state court were removed to the District Court for the Northern District of California and consolidated before District Judge William W. Schwarzer by order entered December 4, 1984.[4] The specific claims against the contractors are typified by the allegations against the Regents of the University of

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[4] *Broudy v. United States* followed a separate track in the Central District of California and twice resulted in reported decisions by the Court of Appeals for the Ninth Circuit. *Broudy v. United States*, 661 F.2d 125 (9th Cir. 1981), *appeal after remand*, 722 F.2d 566 (9th Cir. 1983). *Broudy* was consolidated with the Northern District cases by stipulation for purposes of the appeal and the decision from which this petition arises.

California in connection with the first test series, Operation Crossroads, which was conducted at Bikini Atoll in the summer of 1946. Petitioners contended, *inter alia,* that University of California Radiation Laboratory personnel were negligent in that they: (1) made no advance preparations for decontamination of target or non-target ships and personnel; (2) failed to recruit and train an adequate number of radiation safety monitors; (3) grossly underestimated the nature and quantity of equipment needed to monitor exposure to radiation; (4) failed to educate command personnel to the dangers of radiation exposure; and (5) failed to anticipate the presence of certain types of radiation, including so-called "alpha emitters," described at the time as "the most toxic chemical yet known."

Because of their indemnification contracts with the United States, the private contractors were not directly at risk financially from the suits, although they were vulnerable to the adverse publicity they feared would result. The United States was, however, at risk because of the indemnification contracts. In this respect potential liability did not result from its own actions, but from the acts of the contractors whom it had agreed to indemnify.

After the suits were filed, the contractors and the United States joined in lobbying Congress for passage of a statute that would require the dismissal of the suits. The result was the attachment of a rider to a defense appropriations bill, and its enactment as Section 1631 of the Department of Defense Authorization Act, 1985, Pub. L. 98-525, codified at 42 U.S.C. § 2212 ("Section 2212"). App. 98-100. This statute provides that, in any action brought

against the contractors as a result of personal injury caused by the contractors' participation in the atomic weapons testing program, the United States shall be substituted for such contractors, and the action shall proceed solely against the United States as if it had been originally filed against the United States under the Federal Tort Claims Act. As the legislative record demonstrates, it was the purpose of Section 2212 to allow the United States to obtain dismissals by asserting defenses under the Federal Tort Claims Act that were unavailable to the contractors.[5]

A virtually identical bill to Section 2212 had been considered and rejected by Congress a year before Section 2212 became law. In 1983, the House Armed Services Committee added to a Department of Energy bill an amendment proposed by the contractors who had been made defendants in these suits. The amendment would have characterized the contractors as "instrumentalities" of the United States and would thus have conferred upon them the government's sovereign immunity defenses under the *Feres* doctrine and the Federal Tort Claims Act. The amendment was referred to the House Judiciary Committee for hearings. *Litigation Relating to Atomic Testing: Hearing on H.R. 2797 Before the Subcomm. on Administra-*

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[5]The military Petitioners are barred from suing the United States by the *Feres* doctrine. *Feres v. United States*, 340 U.S. 135 (1950). The civilian Petitioners may sue the United States under the Federal Tort Claims Act, 28 U.S.C. §§ 1346(b), 2671-2680, but such suits are subject to the defenses available under the Act, including the "discretionary function" exception, 28 U.S.C. § 2680 (a); the "combatant activities" exception, 28 U.S.C. § 2680(j); and the "foreign country" exception, 28 U.S.C. § 2680(k). Suits against private contractors are not, and never have been, subject to a defense based on the *Feres* doctrine or to defenses available under the Federal Tort Claims Act.

tive Law and Government Relations of the Comm. on the Judiciary, 98th Cong., 1st Sess. 19 (June 7, 1983) (Sec. 213) ("Litigation Relating to Atomic Testing"). Mr. Bernard W. Vance, Deputy Assistant Attorney General, Civil Division, United States Department of Justice, acting on behalf of the Administration, supported the contractors but suggested that their purpose could be better achieved by an amendment permitting the direct substitution of the United States as a defendant. *Id.* at 37-38.

The Judiciary Committee concluded that the proposed amendment was unconstitutional based on an analysis applicable both to the contractors' proposed amendment and to Mr. Vance's suggested modification. "The Committee is concerned that [the amendment] would eliminate property interests in pending cases in violation of the Fifth Amendment." *H.R. Rep. No. 124,* 98th Cong., 1st Sess., part 4, at 5 (1983) (Adverse Report). Because of the adverse report of the Committee, neither the proposed amendment nor the Administration's suggested modification reached the floor of the House.

The following year, the Administration again requested that a statute be passed permitting substitution of the United States as a defendant for the private contractors. *H.R. Conf. Rep. No. 1080,* 98th Cong., 2d Sess. 349 (1984). The Senate Armed Services Committee added the amendment that Mr. Vance had proposed the previous year as a rider to the 1985 Department of Defense Authorization Act. Neither the House nor the Senate Judiciary Committees saw nor considered the amendment during this second passage through Congress. Section 2212 was approved without debate by the House of Representatives on Sep-

tember 26, 1984 (130 Cong. Rec. H10323), and by the Senate on September 27, 1984 (130 Cong. Rec. S10202), and was signed into law by President Reagan on October 19, 1984.

There is no question that Section 2212 was enacted in response to pending litigation. Deputy Assistant Attorney General Vance, in his 1983 testimony before the House Judiciary Committee, explicitly stated that the purpose of the legislation was to affect the pending suits: "The purpose of this section is to substitute the United States as the sole party in suits alleging damages arising from radiation exposure in the U.S. testing of atomic weapons. At present, there is widespread litigation against independent contractors or contractors who worked closely with the United States in carrying out its atomic weapons testing program." Litigation Relating to Atomic Testing (Testimony of B. W. Vance) at 20. The statement of Theodore Garrish, General Counsel for the Department of Energy, during the same hearings was equally clear: "Several of these contractors have become involved in extensive litigation in which Plaintiffs are alleging specifically that radioactive fallout from the United States' testing of nuclear devices in the Pacific and in the continental United States caused cancers and other injuries. . . . The Department of Energy would welcome a remedy to this circumstance that would alleviate the burden on these government contractors to defend the atomic weapons testing programs and decisions, and it shares the contractors'

concerns in this regard." *Id.* at 40-41.[6] The Government's attorneys in this case have conceded that the purpose of Section 2212 is to affect the pending suits. *See, e.g.,* Brief for Appellants in the court of appeals at 9-10. *See also* 820 F.2d 982, 986 (9th Cir. 1987) (quoting 616 F. Supp. 759, 764 (N.D. Cal. 1985)) App. 9; 51.

The intended consequence of Section 2212 was to obtain dismissals in the pending suits. This is made explicit, *inter alia,* by Mr. Vance's testimony to the House Judiciary committee.

> "Mr. Hall. Doesn't sovereign immunity bar claims of this type brought against the United States under the Federal Tort Claims Act? Doesn't the Feres doctrine preclude suits by active military personnel, and the discretionary function exemption and the other exceptions in 28 U.S.C. 2680 would preclude many if not all of the other claims; is that not correct?
>
> "Mr. Vance. The defenses under the Federal Tort Claims Act, as we envision it, would stay in place, and if the Feres doctrine would apply to particular plaintiffs, we believe it would apply here; yes." (Litigation Relating to Atomic Testing at 21-22)
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> * * * *
>
> "Mr. Frank. Now the effect then of the amendment you're presenting would be for us to go into pending cases and say to plaintiffs who may have a

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[6]The legislation was actively supported by the contractor defendants, who also testified in support of the Administration's position. Litigation Relating to Atomic Testing (Testimony of George Dacey, President of Sandia National Laboratories; William Degarmo, Laboratory Counsel, Lawrence Livermore National Laboratory; and W. R. Hughes, Assistant Director/Laboratory Counsel, Los Alamos National Laboratory) at 42-60.

case, 'you no longer have a case, you're out of court; ['] is that correct?

"Mr. Vance. If the Feres doctrine—

"Mr. Frank. Not if, Mr. Vance. Is that correct?

"Mr. Vance. The Feres doctrine applying, we would have that." (*Id.* at 25; *see also id.* at 26-27)

Shortly after passage of Section 2212, the United States moved to substitute for the contractor defendants in the district court, and filed motions for summary judgment based on the *Feres* doctrine and on Federal Tort Claims Act defenses. The motions were heard virtually without any discovery, and were granted on August 28, 1985. 616 F. Supp. 759 (N.D. Cal. 1985). App. 42-89. The court of appeals affirmed. 820 F.2d 982 (9th Cir 1987) (Anderson, J., joined by Alarcon and Hall, JJ.). App. 1-41. The court of appeals did not write its own opinion, but rather, with immaterial exceptions, quoted verbatim from the opinion of the district court.

REASONS FOR GRANTING THE PETITION

If the court of appeals' decision is permitted to become law, it will establish the following proposition: Whenever the United States and its contractors wish to avoid an unfavorable result in a pending suit, Congress may pass a statute whose sole purpose is retroactively to change the law so that the United States may obtain a dismissal benefiting itself and its contractors. Such a proposition is in fundamental conflict with the constitutional requirement

of separation of powers as established by this Court in *United States v. Klein*, 80 U.S. (13 Wall.) 128 (1872), and *United States v. Sioux Nation of Indians*, 448 U.S. 371 (1980). It is also in fundamental conflict with the constitutional prohibition against taking private property without just compensation as established by this Court in *Armstrong v. United States*, 364 U.S. 40 (1960), and *Ettor v. City of Tacoma*, 228 U.S. 148 (1913).

The case in which review is now sought is the centerpiece of Section 2212 litigation nationwide. Consequently, there is a strong possibility that if the result reached in this case is left intact it will come to be seen as settled law that a statute such as Section 2212 is a permissible exercise of the legislative power.[7] Because of the critical importance of the underlying constitutional principles, and because the decision of the court of appeals is in conflict with applicable decisions of this Court, this Court should grant certiorari.

1. 42 U.S.C. § 2212 Violates Separation Of Powers.

A statute with the purpose and effect of 42 U.S.C. § 2212 is unknown in American law. The most closely analogous statute was that struck down in *United States v. Klein*, 80 U.S. (13 Wall.) 128 (1872). After the Civil War, owners of property confiscated by the government were entitled to compensation or return of their property upon

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[7]The only other court of appeals that has decided a case involving Section 2212 is the First Circuit in *Hammond v. United States*, 786 F.2d 8 (1st Cir. 1986) (Bownes, J., joined by Torruella and Hill, JJ.). That court sustained Section 2212 in a relatively short opinion that did not address the separation of powers issue.

proof that they had not given "aid or comfort" to the rebellion. This Court had held in 1870 that a presidential pardon constituted proof of no "aid or comfort" within the meaning of the statute. *United States v. Padelford*, 76 U.S. (9 Wall.) 531, 532 (1870). Under this holding, Klein had prevailed in the Court of Claims in a suit for compensation based on a pardon. In direct response to Klein's suit, Congress passed a statute purporting to deprive the court of judisdiction over cases in which a pardon was asserted as a basis for recovery. This Court struck down the statute as an unconstitutional infringement on the judicial power.

In *Klein*, Congress had deliberately changed the rule in a pending case in order to benefit the United States, which had seized the property and would be required to turn over the proceeds if the pardon were given effect. This Court concluded that such an action was clearly unconstitutional:

> "Can [Congress] prescribe a rule in conformity with which the court must deny to itself the jurisdiction thus conferred, because and only because its decision, in accordance with settled law, must be adverse to the Government and favorable to the suitor? This question seems to us to answer itself." (*United States v. Klein*, 80 U.S. (13 Wall.) at 147)

In *United States v. Sioux Nation of Indians*, 448 U.S. at 404, this Court recently explained that *Klein* held the statute unconstitutional because

> "[1] it prescribed a rule of decision in a case pending before the courts, and [2] it did so in a manner that required the courts to decide a controversy in the Government's favor." (*Id.*)

Under the two-part test based on *Klein* and articulated in *Sioux Nation*, Section 2212 is unconstitutional. First, as in *Klein*, the purpose of Section 2212 is to change the rule in pending cases. Second, as in *Klein*, the statutory change works in the Government's favor. Because of the indemnification contracts the United States had entered into with the contractors, it was already incurring their costs of legal defense and was obligated to pay any judgment obtained against them. By obtaining dismissals of the suits, the United States avoided any obligation to reimburse the contractors. The ultimate consequence, of course, was to preclude any compensation of the Petitioners for their injuries.

The court of appeals did not understand the unusual nature of Section 2212. It wrote,

> "In adopting this legislation, Congress broke no new ground. In a number of other acts, Congress substituted the FTCA [Federal Tort Claims Act] remedy against the government for remedies available against private parties, and these acts have been uniformly upheld. (Citing the Swine Flu Act, and statutes involving federal motor vehicle drivers and medical personnel)." (820 F.2d 982, 988 (9th Cir. 1987) (quoting 616 F. Supp. 759, 766 (N.D. Cal. 1985) App. 12; 54))

The Court of Appeals for the First Circuit similarly did not understand the unusual nature of Section 2212. *Hammond v. United States*, 786 F.2d at 12-13 ("This is not the first time Congress has substituted the government as defendant in a certain category of tort suits and relegated plaintiffs to an FTCA remedy. Statutory schemes similar to § 2212 have been enacted in the Federal Drivers

Act (citation omitted) . . . , and in the Swine Flu Act (citation omitted) . . . . These two acts have withstood constitutional challenges . . . .''). However, the Swine Flu Act and the statutes involving federal motor vehicle drivers and medical personnel are radically different from Section 2212.

The Swine Flu Act provided that the United States would be substituted as a defendant for swine flu vaccine manufacturers in suits arising out of the swine flu inoculation program. 42 U.S.C. § 247b (revised and in pertinent part now repealed by Pub. L. 95-626 (1978)). But the Swine Flu Act was different from 42 U.S.C. § 2212 in two respects. First, unlike Section 2212, the Swine Flu Act was explicitly made entirely prospective. 42 U.S.C. § 247b (k)(2)(A) (now repealed). The statute was passed before vaccine was manufactured and distributed; it changed no pre-existing legal relationships; and it affected no pending litigation. Second, unlike Section 2212, the Government's liability under the Swine Flu Act was determined under the substantive law applicable to the vaccine manufacturers. The immunities and exceptions available to the United States under the Federal Tort Claims Act were expressly waived, 42 U.S.C. § 247b(k)(2)(A)(ii) (now repealed) (''the exceptions specified in Section 2860(a) of title 28, shall not apply in an action based upon the act or omission of a [Swine Flu] program participant'').

Under the acts involving drivers of motor vehicles and medical personnel employed by the Government, the United States is the proper defendant when such employees are sued for damages. *See* Federal Drivers Act, 28 U.S.C. § 2679(b)-(e); 10 U.S.C. § 1089 (Armed Forces health care

providers); 22 U.S.C. § 817 (Foreign Service health care providers) (repealed, Pub. L. 96-465 (1980)); 38 U.S.C. § 4116 (Veterans Administration health care providers); 42 U.S.C. § 233 (Public Health Service health care providers). These statutes are customary applications of the traditional principle that damage suits against employees of the sovereign are suits against the sovereign. Suits against employees of the sovereign contrast sharply with suits against independent contractors, which have never been treated as suits against the sovereign even where, as here, the contractor is performing a governmental function and where the sovereign has agreed to indemnify the contractor in case tort liability is incurred. *See United States v. Orleans*, 425 U.S. 807, 814-16 (1976).

Statutes governing federal drivers or health care providers do not depart from pre-existing doctrine, and were genuinely designed to substitute one defendant for another, rather than to eliminate the remedy altogether. Moreover, there is no indication that these statutes were ever applied retroactively.[8] By contrast, Section 2212

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[8]The Federal Drivers Act by its own terms provides that it will apply only prospectively. *See* 28 U.S.C. § 2679(b) ("The remedy . . . shall *hereafter* be . . . ." (emphasis added)). In a section of the Act not codified, it was specifically provided, "The amendments made by this Act shall be deemed to be in effect six months after the enactment hereof but any rights or liabilities then existing shall not be affected." Pub. L. 87-258, § 2, 1961 *U.S. Code Cong. & Admin. News* (75 Stat.) 612 (Sept. 21, 1961). The Armed Forces health care providers statute, in a section not codified, specifically provided, "This Act shall become effective on the date of its enactment and shall apply only to those claims accruing on or after such date of enactment." Pub. L. 94-464, § 4, 1976 *U.S. Code Cong. & Admin. News* (90 Stat.) 1989 (Oct.

(Continued on following page)

works a sudden and significant change in the law, and its conscious and deliberate purpose is to operate retroactively to eliminate pending litigation by means of the statutory change.

The proper constitutional function of Congress is to pass laws of general application. The proper constitutional function of the courts is to apply those laws to particular cases. The principle of separation of powers requires that these functions be kept distinct. In enacting Section 2212, Congress has sought, under the guise of legislation, to affect the welfare of people whose identity is clear, whose conduct is complete, and who have already filed suits for redress of their injuries. In enacting Section 2212, Congress has sought to change the applicable substantive law in Petitioners' cases in order to avoid an outcome unfavorable to the United States. If Section 2212 is allowed to have this consequence, the "vital check against tyranny" provided by the separation of powers (*Buckley v. Valeo*, 424 U.S. 1, 121 (1976)), will fail. The decision of the court of appeals seriously erodes the protection provided by the separation of powers, and should not be permitted to stand.

(Continued from previous page)

8, 1976). *See also* Pub. L. 97-124, § 4, 1981 *U.S. Code Cong. & Admin. News* (95 Stat.) 1666 (Dec. 29, 1981) (prospective operation of 1981 amendment). The Veterans Administration health care providers statute, in a section not codified, specifically provided, "The amendments made by this section shall take effect on the first day of the first calendar month which begins more than one hundred and eighty days after the date of enactment of this Act, but, in the case of an act or omission which occurred before such effective date, such amendments shall apply only if no suit or civil action has been commenced before such effective date with respect to such act or omission." Pub. L. 89-311, § 6, 1965 *U.S. Code Cong. & Admin. News* (79 Stat.) 1160 (Oct. 31, 1965).

2. 42 U.S.C. § 2212 Constitutes A Taking Of Property Without Just Compensation.

Section 2212 effects a taking of Petitioners' property without compensation in violation of the Fifth Amendment. Before the passage of Section 2212, Petitioners had accrued causes of action against the contractors under state law. Section 2212 deprived Petitioners of their causes of action for the benefit of the Government, and now Petitioners have nothing. In eliminating Petitioners' causes of action, the United States has forced " 'some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.' " *Connolly v. Pension Benefit Guaranty Corp.*, — U.S. —, 106 S. Ct. 1018, 1027 (1986) (quoting *Armstrong v. United States*, 364 U.S. 40, 49 (1960)).

Causes of action are property rights protected under the Fifth and Fourteenth Amendments. *Armstrong v. United States, supra* (takings); *Ettor v. City of Tacoma*, 228 U.S. 148 (1913) (takings); and *see Dames & Moore v. Regan*, 453 U.S. 654, 688 n.14 (1981) (takings); *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950) (due process); *Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982) (due process). In general, property rights are " 'not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law.' " *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 161 (1980) (quoting *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972)). Petitioners' causes of action consist in traditional tort claims for negligent injury and are property rights under state law.

Petitioners' case is closely comparable to *Armstrong v. United States*, 364 U.S. 40 (1960). Petitioners in *Armstrong* were subcontractors of a shipbuilding company that had contracted to build ships for the Navy. Petitioners had supplied materials for which they had not been paid. When the shipbuilder breached the contract, the United States seized the uncompleted vessels, as it was entitled to do under its contract with the shipbuilder. The Government's action cut off petitioners' materialmen's liens because of the Government's sovereign immunity. This Court concluded that the Government's action constituted a compensable taking:

> "Before the liens were destroyed, the lienholders admittedly had compensable property. Immediately afterwards, they had none. This was not because their property vanished into thin air. It was because the Government *for its own advantage* destroyed the value of the liens . . . . [The Government has a] constitutional obligation to pay just compensation for the value of the liens the petitioners lost and of which loss *the Government was the direct, positive beneficiary.*" (*Armstrong v. United States*, 364 U.S. at 48-49 (emphasis added))

Petitioners in this case had accrued causes of action against the private contractors under state tort law, as petitioners in *Armstrong* had materialmen's liens under state law. The Government in this case, as in *Armstrong*, destroyed the value of those causes of action "for its own advantage". *Id.* at 48. Since the Government would have been obligated to indemnify the contractors in the event of a successful suit by Petitioners, it was the "direct, positive beneficiary" of the destruction of Petitioners' causes of action. *Id.* at 49.

This Court in *Armstrong* applied long-standing constitutional doctrine. An early case reaching the same conclusion is *Ettor v. City of Tacoma*, 228 U.S. 148 (1913), in which the City of Tacoma had damaged plaintiffs' property while grading a street. At the time the damage was done, a state statute required the city to compensate plaintiffs. While plaintiffs' suit was being adjudicated, the statute was changed to eliminate the requirement that the city pay compensation. This Court agreed with plaintiffs' contention "that their right to such compensation, having accrued while the act was in force, cannot be destroyed by subsequent legislation without a violation of the rights guaranteed by the 14th Amendment," (*id.* at 150), and it refused to give effect to the statutory change. "It would seem to need no argument to establish the contention that the obligation to make compensation . . . could not be destroyed by subsequent legislation." *Id.* at 154.

The recent approach of this Court to takings questions produces the same result as in *Armstrong* and *Ettor*. There is no single or fixed formula under recent cases, but this Court has identified several factors that should be taken into account in determining whether a taking has occurred. "Among those factors are: 'the character of the governmental action, its economic impact, and its interference with reasonable investment-backed expectations.' " *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1005 (1984) (quoting *Pruneyard Shopping Center v. Robins*, 447 U.S. 74, 83 (1980)). *See Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 124 (1978). These factors will be discussed in turn.

The governmental action in this case is the sort least favored in takings cases. Section 2212 is not part of a

regulatory program "adjusting the benefits and burdens of economic life to promote the common good." *Penn Central*, 438 U.S. at 124. Rather, it is an unanticipated "acquisition[] of resources" by the Government "to permit or facilitate uniquely public functions." *Id.* at 128. The Government procured the passage of a statute that destroyed the value of Petitioners' causes of action for the Government's "own advantage," and was the "direct, positive beneficiary" of the destruction. *Armstrong*, 364 U.S. at 48-49. Such acquisition of resources for the benefit of the Government has frequently been held to constitute a taking. *Penn Central*, 438 U.S. at 128. *See, e.g., United States v. Causby*, 328 U.S. 256, 262-63 n.7 (1946) (United States military planes' overflight that not "merely destroyed property . . . . [but used] part of it for the flight of its planes" held a taking); *Griggs v. Allegheny County*, 369 U.S. 84 (1962) (overflights held a taking); *Portsmouth Harbor Land & Hotel Co. v. United States*, 260 U.S. 327 (1922) (United States military installations' repeated firing of guns over claimant's land held a taking); *United States v. Cress*, 243 U.S. 316 (1917) (repeated floodings of land caused by water project held a taking).

The United States has consistently sought to justify Section 2212 by pointing to the important public service provided by the contractors involved in the atomic weapons testing program, and by arguing that the quality of this service would be threatened if Petitioners' suits were permitted to go forward. *See, e.g.*, Litigation Relating to Atomic Testing (Testimony of B. W. Vance, Deputy Assistant Attorney General, Civil Division, United States Department of Justice, and testimony of T. J. Garrish,

General Counsel, Department of Energy) at 33-41; 820 F.2d 982, 990-91 (9th Cir. 1987) (quoting *Hammond,* 786 F.2d at 14). App. 18-19. But the invocation of "national defense" as a justification for the destruction of Petitioners' causes of action shows why compensation must be paid rather than why it need not. Precisely because the destruction is in furtherance of a "uniquely public function[]," (*Penn Central,* 438 U.S. at 128), the "public at large . . . must bear the burden of an exercise of state power in the public interest," *Agins v. City of Tiburon,* 447 U.S. 255, 260 (1980).[9]

The economic impact of Section 2212 is clear beyond question. Section 2212 has resulted in the complete and permanent destruction of all economic value of Petitioners' causes of action. This is not a case in which the existence of a taking *vel non* depends on the degree of diminution of value. Section 2212 has entirely destroyed the value of Petitioners' property.

Finally, one must evaluate the factor of "reasonable investment-backed expectations." The court of appeals

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[9]Former servicemen Petitioners have all been denied basic benefits under the Veterans' Benefits Act, 38 U.S.C. §§ 1-654, which is the umbrella program for veterans and their relatives. The civilian Petitioners are, of course, ineligible for any veterans' benefits. These state law tort causes of action represent the sole avenue of redress available to the parties for the losses due to radiation injury which they have asserted. But even if veterans' benefits are available, these would be a separate and distinct entitlement from the Government based on service connected injuries unrelated to fault. Petitioners assert here independent causes of action against private parties based on their negligence under state law. It has never been thought that the availability of veterans' benefits to former servicemen affects their state law causes of action against private party tortfeasors.

appears to have thought no taking existed unless investment-backed expectations could be found. 820 F.2d 982, 989 (9th Cir. 1987) (quoting 616 F. Supp. 759, 770 (N.D. Cal. 1985) (" 'Unlike contract claims, the tort claims asserted here lack "investment-backed expectations." ' "). App. 15; 65. The court of appeals' analysis misapplies the takings jurisprudence of this Court. If investment-backed expectations are always necessary to find that a taking has occurred, even real property acquired by gift or inheritance could never be protected by the takings clause.

This Court has made clear that such investment-backed expectations are not always required. In some circumstances, particularly in land use cases, such expectations are an important factor. But where such expectations are an inappropriate factor, this Court has not hesitated to find a taking even in their absence. For example, in *Hodel v. Irving*, — U.S. —, 107 S. Ct. 2076 (1987), this Court struck down a statute requiring the escheat of certain Indian-owned lands. It specifically noted that there was no "investment-backed expectation" for much of the land, for many of the owners had acquired their land by "gift, descent, or devise." *Id.* at 2083. Where, as here, petitioners' personal injuries are the basis for their property rights in their accrued causes of action, it is obviously inappropriate to require that they have "invested" in such property.[10]

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[10]The expression "investment-backed expectations" has been used by this Court to distinguish between a mere "unilateral expectation" and an entitlement with an identifiable economic

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The courts of appeals in this case and in *Hammond* also thought that petitioners were not protected by the takings clause because " '[n]o person has a vested interest in any rule of law entitling him to insist that it shall remain unchanged for his benefit.' *New York Central R.R. v. White*, 243 U.S. 188, 198 (1917)." 820 F.2d 982, 989 (9th Cir. 1987) (quoting *Hammond*, 786 F.2d at 12 (citations omitted)). App. 14. The courts confused, on the one hand, the ability of the Government to change applicable legal rules and, on the other, the obligation of the Government to compensate those whose accrued causes of action have been rendered valueless by the change.

The existence of power to change a rule of law does not necessarily carry with it the power to effect an uncompensated taking. In *Dames & Moore v. Regan*, 463 U.S. 654 (1981), this Court sustained the power of the United States to enter into a treaty extinguishing all legal proceedings against Iran in United States courts. Although the Court found it unnecessary to decide whether an actual taking had occurred, there was no contention that the existence of governmental power to abrogate the claims eliminated any possible violation of the takings clause. As Justice Powell made clear,

> "The Government must pay just compensation when it furthers the Nation's foreign policy goals by using as 'bargaining chips' claims lawfully held by a rela-

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value. *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. at 161. In this sense, tort causes of action are comparable to claims grounded in contract or real property ownership. The "investment" in a tort cause of action is involuntary, but the cause of action is clearly a legally cognizable entitlement with an identifiable economic value.

> tively few persons and subject to the jurisdiction of our courts. The extraordinary powers of the President and Congress . . . cannot . . . displace the Just Compensation Clause of the Constitution." (*Id.* at 691 (Powell, J., concurring in part and dissenting in part) (footnote omitted))

See also Kaiser Aetna v. United States, 444 U.S. 164, 172 (1979) ("[T]his Court has never held that the navigational servitude creates a blanket exception to the Takings Clause whenever Congress exercises its Commerce Clause authority to promote navigation."); *Nollan v. California Coastal Commission*, — U.S. —, 107 S. Ct. 3141, 3150 (1987) ("The Commission may well be right that it is a good idea [to require beach access], but that does not establish that the Nollans . . . alone can be compelled to contribute to its realization. . . . [I]f [California] wants an easement across the Nollans' property, it must pay for it.").

It is true that statutory changes may sometimes change the rule of decision in accrued causes of action. Permissible retroactive statutory changes may be divided into three broad categories. First, retroactive changes do not result in takings claims when the behavior of the claimant was already heavily regulated and the change in the legal rule could reasonably have been anticipated. *See, e.g., Connolly v. Pension Benefit Guaranty Corp.*, — U.S. —, 106 S. Ct. 1018, 1027 (1986). Second, some retroactive changes are permissible because they are "curative," restoring the law to what it had previously been after a sudden and unexpected change. *See, e.g., Battaglia v. General Motors Corp.*, 169 F.2d 254 (2d Cir.), *cert. denied*, 335 U.S. 887 (1948). Third, some retroactive changes are

permissible because they merely substitute one remedy for another. *See, e.g., Home Building & Loan Association v. Blaisdell*, 290 U.S. 398 (1934).

42 U.S.C. § 2212 does not come within any of these three categories. The assertion of the Government's sovereign immunity defenses on behalf of private contractors under Section 2212 was not a regulatory change that could, or should, reasonably have been anticipated. Rather, it was a sudden and unprecedented change in the previously uniform rule that private contractors did not share the Government's sovereign immunity. Nor, for the same reason, was Section 2212 a "curative" restoration of the law to its prior state. Finally, Section 2212 was not a mere substitution of one remedy for another. It was, rather, the substitution of one defendant for another in order to eliminate any remedy. Petitioners had a remedy against the original defendants; they have none against the United States. As such, Section 2212 retroactively impairs substantive rights contrary to the principles set forth in this Court's decisions in *Bennett v. New Jersey*, 470 U.S. 632 (1985) and *Bradley v. School Board*, 416 U.S. 696 (1974).

The court of appeals in this case has misapplied the underlying principles of takings law, and its decision is in serious conflict with decisions of this Court. It will cause harmful confusion among the lower federal courts and in the state courts, as well as in Congress and in state legislatures, about the reach of governmental power to take property for public use without paying just compensation. It should not be permitted to stand.

3. The Discretionary Function Exception To The Federal Tort Claims Act, 28 U.S.C. § 2680(a), Should Not Be Held To Immunize The Government's Negligent Conduct In Connection With The Atmospheric Testing Program.

Pursuant to Section 2212, the district court permitted the United States to substitute as sole defendant in place of the contractors, and then to assert, *inter alia*, the discretionary function exception to the Federal Tort Claims Act, 28 U.S.C. § 2680(a). The United States also obtained summary judgment on the same ground as to all causes of action arising from its own failure to issue post-discharge warnings to servicemen who had been exposed to radiation during the testing program.

A petition for certiorari to the United States Court of Appeals for the Tenth Circuit was filed in *Allen v. United States*, 816 F.2d 1417 (10th Cir. 1987). 56 U.S.L.W. 3171 (U.S. July 20, 1987) (No. 87-316). That case poses substantially the same legal issues as found herein pertaining to the application of the discretionary function exception in the context of the United States atmospheric testing program. If certiorari is granted in *Allen*, Petitioners respectfully request that this case be held for appropriate disposition in light of the outcome in that case.

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CONCLUSION

The petition for a writ of certiorari should be granted.

DATED: December 8, 1987.

Respectfully submitted,

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App. 1

In re CONSOLIDATED UNITED STATES ATMOSPHERIC TESTING LITIGATION,

Christina KONIZESKI, et al.,

Plaintiffs-Appellants,

v.

LIVERMORE LABS, et al.,

Defendants-Appellees.

Alice P. BROUDY, et al.,

Plaintiffs-Appellants,

v.

UNITED STATES of America,

Defendant-Appellee.

Nos. 85-2842, 86-5553.

United States Court of Appeals,
Ninth Circuit.

Argued and Submitted Feb. 13, 1987.

Decided June 22, 1987.

Alan W. Sparer, San Francisco, Cal., and Ronald G. Bakal, Beverly Hills, Cal., for plaintiffs-appellants.

Marc Johnston, Washington, D.C., for defendants-appellees.

Appeal from the United States District Court for the Northern and Central Districts of California.

Before ANDERSON, ALARCON and HALL, Circuit Judges.

J. BLAINE ANDERSON, Circuit Judge:

These consolidated appeals arise out of judgments entered by the United States District Court for the Northern District of California,[1] in actions for personal injury and wrongful death brought by or on behalf of military and civilian participants in the United States atmospheric nuclear weapons testing program. Appellees are the United States Government and private contractors who participated in the nuclear weapons testing program.

In the district court, the government moved pursuant to 42 U.S.C. § 2212, to be substituted for the contractors as defendants in these actions. The contractors joined in that motion. The government then moved to dismiss or for summary judgment in all actions based on various exceptions to its liability under the Federal Tort Claims Act (the "FTCA"), 28 U.S.C. § 2680.

The district court granted the motion to substitute the government as defendant in place of the contractors, specifically finding 42 U.S.C. § 2212 to be constitutional. It then granted the government's motion for summary judgment pursuant to the FTCA under the discretionary function exception. 28 U.S.C. § 2680(a), the foreign country exception, 28 U.S.C. § 2680(k), the combatant activities exception, 28 U.S.C. § 2680(j), and the *Feres* doctrine, *Feres v. United States,* 340 U.S. 135, 71 S.Ct. 153, 95 L.Ed. 152 (1950). We affirm.

The district court, The Honorable William W. Schwarzer presiding, in its Memorandum Opinion and Order, pub-

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1. Consolidated with these appeals is *Broudy* v. *United States,* No. 86-5553, a case from the Central District of California. The issues unique to *Broudy* will be dealt with in a separate section.

lished as *In re Consolidated U.S. Atmospheric Testing Litigation,* 616 F.Supp. 759 (N.D.Cal.1985), accurately summarized the facts, analyzed the contentions of the parties, and properly applied the law to this case. The opinion is well reasoned, and we adopt, with appropriate deletions and additions, the following portions of it as the opinion of this court.[2]

I. FACTS

"The atmospheric nuclear weapons tests giving rise to these actions took place between the closing days of World War II and the adoption of the Partial Nuclear Test Ban Treaty in 1963. Even before these tests, the United States Government had enlisted the scientific resources of industrial firms and universities in the program to develop an atomic bomb. The Manhattan Project, which ultimately produced the bomb detonated over Hiroshima, was an unprecedented joint effort by the government, universities and industry.

"Immediately following the end of World War II, the military services proposed a series of tests to determine the effects of atomic weapons. On orders of the

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2. Brackets together, in this manner [], without enclosing material are used to indicate deletions from the opinion of the district court; brackets enclosing materials are, unless otherwise indicated, used to denote insertions or additions by this court. Footnotes in the district court opinion have been renumbered sequentially. Where appropriate, we have added and adopted portions of First Circuit's opinion in *Hammond v. United States,* 786 F.2d 8 (1st Cir.1986). *Hammond* examined 42 U.S.C. § 2212 and held that substituting the United States as defendant in all suits against private contractors for radiation injuries arising from any of the United States atomic weapons testing programs, was constitutional.

President, a joint military task force was established to conduct the first of these tests, Operation Crossroads, at Bikini Atoll. The task force, commanded by an admiral, comprised 42,000 military and civilian personnel and numerous ships and aircraft.

"In 1946, Congress adopted the Atomic Energy Act, (the 'AEA'), establishing a national policy for the development and control of nuclear weapons. Under the AEA, authority was transferred from the military to the Atomic Energy Commission, (the 'AEC'), which was to operate a 'program of federally conducted research and development' with the 'paramount objective of assuring the common defense and security.' AEA, P.L. No. 585, ch. 724, 60 Stat. 755, §§ 1(a), (b)(3) (current version at 42 U.S.C. § 2011 *et seq.*). To this end the AEC was authorized to conduct experiments, undertake research, and develop the military applications of atomic energy either in its own facilities or pursuant to arrangements with public or private institutions. *Id.* at § 4(c)(2). All right, title and interest in fissionable material was vested in it. *Id.* at §§ 4(b), 5(a)(2). The production of atomic bombs and bomb parts was authorized, but 'only to the extent that the express consent and direction of the President of the United States has been obtained. . . .' *Id.* at § 6(a)(2). In addition, Congressional oversight of the AEC's activities was established by creation of the Joint Committee on Atomic Energy. *Id.* at § 15(a). The AEA thus established a program of pervasive '[g]overnmental control of the production, ownership, and use of fissionable material', including the development and testing of nuclear weapons. *Id.* at § 1(b)(4).

"When the AEC took over the nuclear weapons program from the military, it acquired a complex of plants, laboratories and other facilities staffed by some 2,000 military personnel, 4,000 civilian government employees and 38,000 employees of contractors. The integral role of contractors, which started in the Manhattan Project, continued under the AEC. The University of California, Sandia Corporation and Reynolds Electrical and Engineering Co., Inc., were among those contractors.

"Escalating international tensions, marked by the Berlin blockade in 1948, the confrontation with the Soviet Union over Czechoslovakia, Greece and Iran, the detonation by the Soviet Union of an atomic device in 1949, and the Korean War led the government to assign the highest priority to the development and production of nuclear weapons. Weapons tests were an essential part of that effort.

"These tests were regarded as critical to national security. Presidents Eisenhower and Kennedy and the Chairman of the AEC made public statements stressing the vital importance of tests to the development of modern weapons needed to assure national security in the face of the threat posed by the Soviet Union. Indeed, atmospheric nuclear weapons testing was a major issue in United States-Soviet relations during this period. Beginning in 1955, testing was a topic in the disarmament negotiations. In 1958, a moratorium on tests was agreed on and was observed until the Soviet Union resumed atmospheric testing in 1961. The United States followed suit to counteract qualitative improvements in Soviet weapons. In 1963, atmospheric nuclear tests were finally banned by the Partial Nuclear Test Ban Treaty.

"From 1947 through 1963, the AEC in conjunction with the Department of Defense conducted 21 test series, some of which are the subject of these actions. These tests had a number of objectives, including developing weapons, planning their tactical and strategic use, determining how targets could be given protection, assessing the vulnerability of troops to the effects of detonations and improving radiological safety. A particular objective of the tests was to determine the effects of nuclear explosions on the equipment, clothing, weapons and fighting capability of military personnel. The tests were coordinated with studies conducted at laboratories operated by contractors.

"Every phase of the preparation and implementation of each nuclear weapons test series was closely controlled and supervised by government officials. Initially, proposals for tests had to be approved at various levels by the responsible divisions of the AEC and the Department of Defense. Before any test took place, a detailed Operation Plan had to be reviewed and approved by the AEC, by the National Security Council, and finally by the President.

"Tests at the Pacific Proving Ground were under the control of a joint task force commander, appointed by the AEC and the Joint Chiefs of Staff. At the Nevada Test Site, tests were under the control of a Test Manager designated by the AEC. Tests were conducted in conformity with the approved Operation Plan, which incorporated radiation exposure limits established by the AEC applicable to both military and civilian personnel. Various military and civilian committees and medical and scientific experts took part in making the decisions which were in-

corporated into the Operation Plan. Designated units in each test organization were assigned responsibility for radiological safety.

"Nuclear weapons testing was known to be an inherently dangerous activity. Aside from the recognized radiation hazards, the risks included the dangers associated with any explosive devices, the effects of unpredictable meteorological conditions, and the risks of injury inherent in any large-scale military operation.

"The need to balance risks against test objectives was particularly acute in tests involving troop maneuvers. These tests were intended to expose troops to battlefield conditions to test psychological reactions and protective measures. The location and movement of those troops was a subject of controversy between the AEC and military commanders. It was recognized that the desire of the military to expose troops to realistic combat conditions could interfere with the AEC's weapons testing objectives. The arrangements ultimately incorporated in the Operation Plans represented an accommodation of these divergent requirements by the AEC and military officials. In later tests, involving large scale military maneuvers under battlefield conditions, these considerations led to delegation of responsibility for radiological and physical safety of troops to the military commanders.

II. DISCUSSION

A. Motions to Substitute—42 U.S.C. § 2212

1. The Provisions and Effect of § 2212

"In October 1984, Congress adopted § 1631 of the Department of Energy National Security and Military Appli-

cations of Nuclear Energy Authorization Act of 1985, (the 'Act'), codified at 42 U.S.C. § 2212. It provides that an action against the United States shall be the exclusive remedy for injuries 'due to exposure to radiation based on acts or omissions by a contractor in carrying out an atomic weapons testing program under a contract with the United States', § 2212(a)(1), and requires any action against these contractors to be maintained solely against the United States pursuant to the FTCA. The Act applies to alleged acts or omisisons of contractors 'without regard to when the act or omission occurred.' § 2212(a)(2).

The Act provides, in pertinent part, that:

> A contractor against whom a civil action or proceeding described in subsection (a) . . . is brought shall promptly deliver all processes served upon that contractor to the Attorney General of the United States. *Upon certification by the Attorney General* that the suit against the contractor is within the provisions of subsection (a) . . . , a civil action or proceeding commenced in a State court shall be removed without bond at any time before trial by the Attorney General to the district court of the United States for the district and division embracing the place wherein it is pending and the *proceedings shall be deemed a tort action brought against the United States.* . . . For the purposes of removal, the certification by the Attorney General under this sub-section establishes contractor status conclusively.

42 U.S.C. § 2212(b) (emphasis added).

"A 'contractor' is defined as a 'contractor or cost reimbursement subcontractor of any tier participating in the conduct of the United States atomic weapons testing program. . . .' § 2212(d). Authority to certify pursuant

to § 2212(b) that the action against the contractor 'is based on acts or omissions by a contractor in carrying out an atomic weapons testing program under a contract with the United States' rests with the Attorney General. § 2212 (a)(1).

"In its statement supporting the Act, the Department of Justice explained the unique situation at which it is aimed:

> [The Act] would clarify the status of certain contractors operating government-owned facilities relating to atomic energy national defense activities in litigation arising from those activities. Many actions recently have been brought against these contractors who have invaluably assisted the Government of the United States in carrying out its nuclear weapons testing program. The actions allege exposure to radiation and consequent injury or death as a result of the United States atomic weapons testing.
>
> The provisions of the Federal Tort Claims Act determine the rights of individuals and corporate litigants to seek monetary recovery from the United States for alleged torts. Typically, the United States cannot be sued for and is not liable for the acts of independent contractors providing goods or services to the United States. However, contractors who operate nuclear weapons testing facilities for the Department of Energy or its predecessor agencies and who, as a result, have participated in the atomic weapons testing program are unique. They are not typical contract suppliers of commercially provided goods or services to the government. These contractors were and are utilized by the United States as instruments of national policy to assist in an entirely governmental task—nuclear weapons research, development and testing. Further, the government reimburses these contractors for any liability arising out of their assist-

> ance in the weapons program, including the costs of litigation. The use of the contractors to implement national policy and perform a uniquely governmental function cannot be disputed. Therefore, it should be perfectly clear that, for the purposes of civil litigation arising from atomic weapons testing, the proper party defendant is the government. Only the government sets policy, makes decisions, and controls activities and circumstances regarding atomic weapons testing.

H.R.Rep. No. 124, Part I, 98th Cong., 1st Sess. 34-35 (1983).

"The report of the Senate Committee on Armed Services elaborates the Act's underlying rationale:

> Each nuclear test that has been made since 1946 has been made under statutory direction of Congress. Each nuclear test has been approved, before the fact, by the President of the United States. Each nuclear test has been under the direct supervision of government officials. Each nuclear test has been participated in by hundreds, and in some cases thousands, of government officials and military and civilian personnel.
>
> The committee recognizes, as has the Congress, that the military applications of atomic energy could not proceed either technically or economically without the participation of organizations that possess both scientific management skills and a high degree of scientific and technical expertise. Several such organizations were placed under contract almost at the inception of the nuclear weapons program in 1942 and have performed in an outstanding manner in the national interest for more than three decades. These organizations have provided scientific, engineering and technical support for nuclear tests carried out by the government and for the government in the exer-

> cise of a governmental function, i.e., providing for the national defense. These organizations did not order the tests to be performed; they did not set the times or places for the tests; nor did they direct military or civilian government personnel to participate in them.

S.Rep. No. 500, 98th Cong., 2d Sess. 376 (1984).

"The Senate Report described the effect of the legislation as follows:

> [The Act] would cause all litigation involving the atomic weapons testing program, including suits now filed against contractors, to be maintained against the United States under the substantive and procedural requirements of the FTCA.

Id. at 375. By its terms, however, the Act is specifically limited to claims

> for injury, loss of property, personal injury, or death due to exposure to radiation based on acts or omissions by a contractor in carrying out an atomic weapons testing program under a contract with the United States.

42 U.S.C. § 2212(a)(1).

"The instant actions [] qualify under the Act. The Attorney General [] made the statutory certification. The [appellees'] motions to substitute the United States as the sole defendant in these actions must be granted unless § 2212 is found to be invalid."

[Appellants raise several issues concerning the constitutionality of 42 U.S.C. § 2212: (1) whether § 2212 constitutes a taking without just compensation in violation of the fifth amendment; (2) whether § 2212 violates the procedural and substantive due process requirements of the

fifth and fourteenth amendments; (3) whether § 2212 violates the principle of separation of powers; and (4) whether § 2212 deprives appellants of their right to a jury trial as guaranteed by the seventh amendment.]

2. Constitutionality of § 2212

a. Fifth Amendment—Taking

"The effect of § 2212 is to substitute the remedy against the government under the FTCA for any cause of action against the contractors arising under state law. In adopting this legislation, Congress broke no new ground. In a number of other acts, Congress substituted the FTCA remedy against the government for remedies available against private parties, and these acts have been uniformly upheld. *See Ducharme v. Merill-National* [sic] *Laboratories*, 574 F.2d 1307 (5th Cir.), *cert. denied*, 439 U.S. 1002, 99 S.Ct. 612, 58 L.Ed.2d 677 (1978) (Swine Flu Act); *Carr v. United States*, 422 F.2d 1007 (4th Cir. 1970) (Federal Drivers Act). *See also* 42 U.S.C. § 233 (Public Health Service medical personnel); 38 U.S.C. § 4116 (Veterans Administration medical personnel); 22 U.S.C. § 817(a) (State Department medical personnel); 10 U.S.C. § 1089 (a) (Armed Forces medical personnel).

"[Appellants] contend that the Act [] results in a compensable taking. In a classic example of understatement, the Supreme Court has said that '[t]he question of what constitutes a "taking" for purposes of the Fifth Amendment has proved to be a problem of considerable difficulty.' *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 123, 98 S.Ct. 2646, 2658, 57 L.Ed.2d 631 (1978)."

[A two-step analysis is used to determine whether a "taking" has occurred. First, is the subject matter (i.e., a pending cause of action) "property" within the meaning of the fifth amendment? Second, if so, has there been a taking of that property?]

"A cause of action has been described as a 'species of property protected by the Fourteenth Amendment's Due Process Clause.' *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 428, 102 S.Ct. 1148, 1154, 71 L.Ed.2d 265 (1982) (quoting *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313, 70 S.Ct. 652, 656, 94 L.Ed. 865 (1950)). *See also In re Aircrash in Bali, Indonesia on April 22, 1974*, 684 F.2d 1301, 1312 (9th Cir.1982) (dictum).[3] [] It is helpful at the outset to recognize that ' "[a] claim of *deprivation* of property without due process of law cannot be blended as one and the same with the claim that property has been *taken* for public use without just compensation." ' *Kizas v. Webster*, 707 F.2d 524, 539 (D.C.Cir.1983), *cert. denied*, 464 U.S. 1042, 104 S.Ct. 709, 79 L.Ed.2d 173 (1984) (quoting J. Sackman, *Nichols' The Law of Eminent Domain* § 4.3 at 187 rev. 3d ed. cum. supp. 1982) (emphasis in original). []"

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3. In *Bali*, the court of appeals in dictum postulated that wrongful death claims are property within the meaning of the just compensation clause. The court, however, reserved the question whether the Warsaw Convention, limiting the amount recoverable in a wrongful death action, constituted a compensable taking.

[In *Ducharme v. Merrill-National Laboratories,* 574 F.2d 1307 (5th Cir.), *cert denied,* 439 U.S. 1002, 99 S.Ct. 612, 58 L.Ed.2d 677 (1978), the Fifth Circuit examined the constitutionality of the Swine Flu Act, 42 U.S.C. § 247. Like § 2212, this statute provides for the substitution of the United States as the sole defendant. That court found it well settled that "a plaintiff has no vested right in any tort claim for damages under state law." *Id.* at 1309 (citing *Keller v. Dravo Corporation,* 441 F.2d 1239 (5th Cir. 1971), *cert. denied,* 404 U.S. 1017, 92 S.Ct. 679, 30 L.Ed.2d 665 (1972)). *See also Carr v. United States,* 422 F.2d 1007 (4th Cir.1970). Furthermore, in *Hammond,* the First Circuit found:

> "No person has a vested interest in any rule of law entitling him to insist that it shall remain unchanged for his benefit." *New York Central R.R. Co. v. White,* 243 U.S. 188, 198, 37 S.Ct. 247, 250, 61 L.Ed. 667 (1917); *Duke Power Co. v. Carolina Environmental Study Group, Inc.,* 438 U.S. 59, 88 n. 32, 98 S.Ct. 2620, 2638 n. 32, 57 L.Ed.2d 595 (1978); *Second Employers' Liability Cases,* 223 U.S. 1, 50, 32 S.Ct. 169, 175, 56 L.Ed. 327 (1912); *Ducharme v. Merrill-National Laboratories,* 574 F.2d 1307, 1309 (5th Cir.), *cert. denied,* 439 U.S. 1002, 99 S.Ct. 612, 58 L.Ed.2d 677 (1978). This is true after suit has been filed and continues to be true until a final unreviewable judgment is obtained.

Hammond, 786 F.2d at 12.]

"While a cause of action is considered to be a species of property, as heretofore discussed, those words do not

translate into a cognizable taking claim. *See In re Aircrash in Bali, Indonesia on April 22, 1974,* 684 F.2d 1301, 1312 (9th Cir.1982). Whether such a claim exists is subject to an 'essentially ad hoc, factual inquir[y].' *Penn Central,* 438 U.S. at 124, 98 S.Ct. at 2659. Both the nature of the property right and of the governmental invasion must be considered [to determine whether a taking has occurred.]

"Unlike contract claims, the tort claims asserted here lack 'investment-backed expectations.' " *Penn Central,* 438 at 124, 98 S.Ct. at 2659. *Cf. Lynch v. United States,* 292 U.S. 571, 579, 54 S.Ct. 840, 843, 78 L.Ed. 1434 (1934). Not only are they contingent by their nature, but they also arise in a field in which the law remains to be developed. *See, e.g., Molsbergen v. United States,* 757 F.2d 1016, 1020-25 (9th Cir. 1985).

"The governmental action, moreover, does not abrogate the claims but subjects them to the tort claims procedure which the plaintiffs could reasonably expect might be applied. This is true, notwithstanding the naming of contractors as defendants, because the claims arose out of activities conducted by the government and the contractors were named [by appellants]for the obvious purpose of escaping the well-known limits on the government's waiver of sovereign immunity. For these reasons, the Court concludes that [appellants] do not have a taking claim."

b. Fifth Amendment—Due Process

(i) Procedural Due Process

[As indicated above, a cause of action has been recognized as a species of property protected by the fifth amendment's due process clause.]

"To say that a cause of action is a species of protected property, however, is not to answer the question of what process is due. A cause of action is property of a substantially different nature than real or personal property or vested intangible rights. It is inchoate and affords no definite or enforceable property right until reduced to final judgment. *Cf. Armstrong v. United States,* 364 U.S. 40, 80 S.Ct. 1563, 4 L.Ed.2d 1554 (1960) (state law materialman's lien entitling supplier to resort to specific property to satisfy claims is a property right compensable under fifth amendment); *Lynch v. United States,* 292 U.S. 571, 579, 54 S.Ct. 840, 843, 78 L.Ed. 1434 (1934) (contract rights are property rights compensable under fifth amendment).

"A cause of action does not afford the holder the traditional bundle of rights associated with the ownership of property. *Cf. United States v. Security Industrial Bank,* 459 U.S. 70, 75-76, 103 S.Ct. 407, 410-11, 74 L.Ed.2d 235 (1982). Instead, it represents a right to assert a claim for compensation or some other form of judicial relief. Its value is contingent on successful prosecution to judgment. Thus, to the extent it is entitled to due process protection, that protection focuses on assuring access to fair procedures for its prosecution. The notion of due process relevant to causes of action is that 'deprivation

. . . by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case.' *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313, 70 S.Ct. 652, 656, 94 L.Ed. 865 (1950)." [On notice of hearing, appellants were given the opportunity to present their claims before the district court. The requirements of procedural due process were thereby satisfied. The plaintiffs' claims were simply unavailing under the procedure pursued by them. Procedural due process, however, does not guarantee that a party will prevail. *Logan*, 455 U.S. at 432, 102 S.Ct. at 1155-56. To the extent that § 2212 may have abrogated appellants' causes of action by substituting the parties and remedies, this court's analysis will focus on substantive due process.]

(ii) Substantive Due Process

[We adopt the *Hammond* court's cogent due process analysis of § 2212 with the following deletions and additions:

"[] Congress must comply with due process when abolishing or substantially modifying a common law cause of action. In that sense the right to sue is a 'species of property.' *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 428, 102 S.Ct. 1148, 1154, 71 L.Ed.2d 265 (1982); *see Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 U.S. at 82-94, 98 S.Ct. at 2635-41. But, an act of Congress comes to us clothed with a presumption of constitutionality, and the burden is on the plaintiff to show that it violates due process. *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 15, 96 S.Ct. 2882, 2892, 49 L.Ed.2d 752 (1976); *McGowan v. Maryland*, 366 U.S. 420, 425-26, 81 S.Ct. 1101, 1104-05, 6 L.Ed.2d 393 (1961).

"Because Congress has acted within its powers under the war powers and commerce clauses of the Constitution and there is no fundamental right or suspect classification involved here, we find that the rational basis standard of due process review applies.

"In applying the rational basis test to this case we follow the guidance of the Supreme Court in *Pension Benefit Guaranty Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 728-34, 104 S.Ct. 2709, 2717-20, 81 L.Ed.2d 601 (1984); *Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 U.S. at 82-94, 98 S.Ct. at 2635-41; and *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. at 15-20, 96 S.Ct. at 2892-94. We find that [appellants have] not met [their] burden of showing that § 2212 is wholly arbitrary and irrational in purpose and effect, *i.e.*, not reasonably related to a legitimate congressional purpose. *See United States R.R. Retirement Bd. v. Fritz*, 449 U.S. 166, 174-77, 101 S.Ct. 453, 459-60, 66 L.Ed.2d 368 (1980); *Vance v. Bradley*, 440 U.S. 93, 97-98, 99 S.Ct. 939, 942-43, 59 L.Ed.2d [sic] (1979).

"The reasons asserted by the United States for Congress' enactment of § 2212 are neither arbitrary nor irrational, and can be stated simply. The United States has operated a nuclear weapons testing program for over 40 years. It initiates, designs and authorizes all nuclear tests under the program but has found it necessary to obtain the assistance of various private entities including universities and private companies for many aspects of the testing. From the late 1940's to the early 1960's a series of above-ground tests of atomic weapons were conducted with military personnel, civilian government employees and private employees of government contractors

taking part. [] There is no dispute that these tests were designed and supervised by government officials and were individually authorized by the President. A significant number of those present at the above-ground tests have instituted suits against the government contractors involved in them for injuries caused by radiation exposure. The contractors are generally not threatened with financial liability by these suits since most of their contracts with the government included a clause making the United States indemnitor for all tort liability, including costs of litigation, arising from their participation in the testing programs. S.Rep. No. 500, 98th Cong., 2d Sess. 374-76 (1984). Congress has nevertheless perceived these lawsuits to constitute a threat to the continued participation of the private contractors in the nuclear weapons program because the contractors fear the bad publicity generated by the suits. The contractors testified before Congress that the lawsuits have led the public to blame them for the formulation, implementation and execution of the atomic weapons testing policy of the United States. H.R.Rep. No. 124, Part 4, 98th Cong., 1st Sess. 2-3 (1983). They also testified that the lawsuits result in a diversion of human and financial resources away from research and testing activities and into litigation and, therefore, seriously disrupt their participation in the program. *See Litigation Relating to Atomic Testing, 1983: Hearings on H.R. 2797 before the Subcommittee on Administrative Law and Governmental Relations of the House Committee on the Judiciary,* 98th Cong., 1st Sess. 46-49 (1983). [Appellants assert] that the mere public embarrassment of the private contractors is not a rational or legitimate reason for relieving them of liability. We disagree. Even if we

question the extent and effect of this public embarrassment it is not for us to reevaluate it. It is a plausible reason for Congress' action. *United States R.R. Retirement Bd. v. Fritz*, 449 U.S. at 179, 101 S.Ct. at 461.

"Nor has Congress chosen a wholly arbitrary or irrational means to its legitimate end. [Appellants] claim[] that Congress created only an illusory substitute remedy in § 2212, that [] probably will not [] compensate[] [them] because under the terms of § 2212(a)(2) the 'limitations and exceptions' applicable to the remedies provided by § 2212 are preserved. []"]

"[Appellants] argue, however, that the Act must be viewed not simply as a substitution of remedies, but rather as an abrogation of existing claims. By substituting the FTCA remedy, the claims become subject to dispositive defenses available to the government, including the *Feres* doctrine and the discretionary function exception."

["Nevertheless, although Congress could have relieved the independent contractors of their burden of defending suits for radiation injuries and still provided those injured by radiation a more generous substitute compensation scheme, we cannot say that Congress' choice of means was without any rational basis. The atomic weapons testing program has been an important, some say vital, government function from its inception. Independent contractors were used only to aid the government to carry out its program. When the program began Congress could have mandated that all tort claims arising from it be litigated through the FTCA. Under the statute as originally enacted, [appellants] had the right to sue contractors without restriction, but it was the government who paid the

judgment under its indemnitor agreement with the contractor. [Appellants] had the best of both possible worlds, a right to sue free of any FTCA limitations with the government guaranteeing payment of the judgment. It was neither arbitrary nor irrational for Congress to change the law so as to place putative [appellants] in the same position as any other party suing the United States in tort. *See Hearings, supra,* at 46-48; S.Rep. No. 500, *supra,* at 377. Moreover, there may be government compensation available to many of those injured by radiation, including [appellants] here, under veterans benefits legislation, 38 U.S.C. §§ 301-363, §§ 401-423, or the FECA." *Hammond,* 786 F.2d at 14.]

[Finally, appellants argue that § 2212 cannot be applied to them retroactivly. However, "[t]he retroactive application of a federal statute . . . is not forbidden under the constitution so long as due process requirements are met." *Matter of Reynolds,* 726 F.2d 1420, 1422 (9th Cir. 1984) (citing C.D. Sands, *Statutes and Statutory Construction,* § 41-03 (4th ed. 1973)) (footnote omitted). As a general rule, a judge should apply the law in effect on the date of a decision. *Matter of Reynolds,* 726 F.2d at 1422; *United States v. The Schooner Peggy,* 5 U.S. (1 Cranch) 103, 110, 2 L.Ed. 49 (1801). To comport with the requirements of due process, the retroactive application of a statute must be supported by a legitimate legislative purpose furthered by a rational means. *Pension Benefit Guaranty Corp.,* 467 U.S. at 729, 104 S.Ct. at 2717-18. "[T]he burden is on one complaining of a due process violation to establish that the legislature has acted in an arbitrary and irrational way." *Id.* (quoting *Turner Elk-*

horn Mining Co., 428 U.S. at 15, 96 S.Ct. at 2892). As we discussed above, appellants have not met this burden].

c. Separation of Powers Doctrine

"Congressional attempts to alter the rule of decision in pending cases in favor of the government have been condemned as a violation of Article III. *See United States v. Klein*, 80 U.S. (13 Wall.) 128, 146-47, 20 L.Ed. 519 (1871); *United States v. Sioux National of Indians*, 448 U.S. 371, 404, 100 S.Ct. 2716, 2735, 65 L.Ed.2d 844 (1980). The instant cases, however, do not fall within that prohibition. Section 2212 does not withdraw jurisdiction from the federal courts, does not deprive a party of the benefit of a judgment, and does not mandate the outcome of particular cases. It substitutes remedies but it leaves the application of the rules of law, including any defenses, for judicial determination. *See Dames & Moore v. Regan*, 453 U.S. 654, 685, 101 S.Ct. 2972, 2989, 69 L.Ed.2d 918 (1981).

> [T]he better reading of *Klein* is quite narrow and construes the case as holding only that Congress violates the separation of powers when it presumes to dictate 'how the Court should decide an issue of fact (under threat of loss of jurisdiction)' and purports to 'bind the Court to decide a case in accordance with a rule of law independently unconstitutional on other grounds.'

United States v. Brainer, 691 F.2d 691, 695 (4th Cir.1982) (quoting P. Bator, D. Shapiro, P. Mishkin & H. Wechsler, *Hart & Wechsler's The Federal Courts and the Federal System* 316 n. 4 (2d ed. 1973)). Since the Act neither directs the court to make a certain finding of fact nor requires them to apply an unconstitutional law, the separa-

tion of powers doctrine is not offended. *See also Battaglia* [*v. General Motors Corporation*], 169 F.2d [254, 262 (2d Cir.1948)]."

d. Seventh Amendment—Right to Jury

[Appellants argue that they were unconstitutionally deprived of their right to trial by jury because § 2212 makes an FTCA action against the United States the exclusive remedy for damages.[4] The court in *Hammond* held:

> There is no right to a jury trial against the sovereign under the seventh amendment, *Glidden Co. v. Zdanok*, 370 U.S. 530, 572, 82 S.Ct. 1459, 1484, 8 L.Ed. 2d 671 (1962). If the United States can abolish the right to a cause of action altogether it can also abolish the right to a jury trial that is part of it. When the United States abolishes a cause of action and then sets up a separate administrative remedy against itself, as it has [with § 2212], the seventh amendment does not require that it must also provide a jury trial.

Hammond, 786 F.2d at 15. We agree and find that appellants were not unconstitutionally deprived of their right to a jury trial.]

"Section 2212 is therefore a valid exercise of Congressional power. The United States must be substituted as the defendant in place of the contractors, and the contractors dismissed from these actions."

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4. The FTCA specifically provides that in tort actions against the United States, trials shall be to the court without a jury. 28 U.S.C. § 2402.

B. Motion for Summary Judgment

"Under § 2212, these actions must be treated as having been brought against the United States under the FTCA. The FTCA is a limited waiver of sovereign immunity subject to certain statutory and judicial exceptions. The government [] moved [and the district court granted, a motion] for summary judgment on the ground that each [appellant's] claims are barred by one or more of those exceptions.

[1]. The Discretionary Function Exception

"The FTCA excludes any claim 'based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.' 28 U.S.C. § 2680(a). The government raises the discretionary function exception as a defense to all claims raised by all [appellants].

[a]. Claims arising out of acts or omissions in connection with the detonation of nuclear weapons.

"[Appellants'] first category of claims is based on injuries caused by their exposure to radiation from nuclear weapons. They may be summed up as resting on alleged negligent failures to take adequate safety precautions at the test sites.

"[Appellants] acknowledge that the decision to conduct the tests is covered by the discretionary function. They contend, however, that the Court must examine each challenged act or omission to determine whether, in the

light of the policies underlying the exception, it is of the type that Congress intended to protect. According to [appellants], many of those acts involved only the exercise of what they refer to as 'scientific or professional judgment' in implementing an overall decision to conduct the atomic weapons testing program and hence are not covered by § 2680(a). *See e.g., Driscoll v. United States,* 525 F.2d 136 (9th Cir.1975). In addition, they argue that the government can be held liable for failing to enforce its own safety requirements.

"The fountainhead of jurisprudence relating to the discretionary function exception is *Dalehite v. United States,* 346 U.S. 15, 73 S.Ct. 956, 97 L.Ed. 1427 (1953). The continuing vitality of that decision was recently affirmed in *United States v. S.A. Empresa de Viacao Aerea Rio Grandense* (*'Varig'*), 467 U.S. 797, 104 S.Ct. 2755, 81 L.Ed. 2d 660 (1984). *Dalehite* involved claims for damages against the United States arising out of a disastrous explosion of ammonium nitrate fertilizer, which had been produced and distributed under the direction of the United States for export to areas occupied by the Allied Armed Forces after World War II. Numerous acts of the government were charged as negligent: the cabinet-level decision to institute the fertilizer export program, the failure to experiment with the fertilizer to determine the possibility of explosion, the drafting of the basic plan of manufacture, and the failure properly to police the storage and loading of the fertilizer.

"The Supreme Court concluded that these allegedly negligent acts were governmental duties protected by the discretionary function exception and held the actions barred

by § 2680(a). Describing the discretion protected by § 2680(a) as 'the discretion of the executive or the administrator to act according to one's judgment of the best course,' 346 U.S. at 34, 73 S.Ct. at 967, the Supreme Court stated:

> It is unnecessary to define, apart from this case, precisely where discretion ends. It is enough to hold, as we do, that the 'discretionary function or duty' that cannot form a basis for suit under the Tort Claims Act includes more than the initiation of programs and activities. It also includes determinations made by executives or administrators in establishing plans, specifications or schedules of operations. Where there is room for policy judgment and decision there is discretion. It necessarily follows that acts of subordinates in carrying out the operations of government in accordance with official directions cannot be actionable.

Id. at 35-36, 73 S.Ct. at 967-68 (footnotes omitted). In the course of its opinion, the Supreme Court analyzed the legislative history of the FTCA. It noted that 'congressional thought was centered on granting relief for the run-of-the mine accidents, as distinguished from injury from performing discretionary governmental functions,' *id.* at 28, n. 19, 73 S.Ct. at 964, n. 19, and concluded that in § 2680 'Congress exercised care to protect the Government from claims, however negligently caused, that affected the governmental functions.' *Id.* at 32, 73 S.Ct. at 966. [footnote omitted].

"*Dalehite* is squarely on point. The argument made by plaintiffs in that case, and rejected by the Supreme Court, was essentially the same as that made here, i.e., that the charges were directed not at

> 'any Cabinet decision . . . [but] only to the mistakes of judgment and the careless oversight of Government employees who were carrying out a program of manufacturing and shipping fertilizer and who failed to concern themselves as a reasonable man should with the safety of others.'

Id. at 35, 73 S.Ct. at 967 (quoting petitioners' arguments).

"The specific acts of negligence charged were the temperature at which the fertilizer was bagged, the coating and bagging materials used, and the labelling of the bags. *Id.* at 39, 46-57, 73 S.Ct. at 969, 973-79. The Supreme Court found all of these acts covered by the discretionary function exception because they were 'performed under the direction of a plan developed at a high level under a direct delegation of planmaking authority from the apex of the Executive Department.' *Id.* at 40, 73 S.Ct. at 970.

"The case presented by [Appellants] is congruent with *Dalehite*. [Appellants] chose to focus their arguments on the conduct of Operation Crossroads.[5] There, too, a detailed and extensive Operation Plan was adopted on orders from the highest levels of the Executive Department.[6] An integral part of that Plan was an extensive

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5. Plaintiffs' Op.Br. at 3. That operation, according to plaintiffs, epitomizes the nuclear weapons testing program at its worst: "In hindsight Operation Crossroads was an extraordinary fiasco, America's first nuclear disaster. The Joint Task Force took a radiation bath without adequate resources to deal with the decontamination problems that ensued." *Id.* at 76.

6. Government Exhibits E-7.10-7.15. Operation Plans for subsequent tests may be found at Government Exhibits E-8 (Operation Buster-Jangle), E-9 (Operation Castle), E-10 (Operation Redwing), E-11 (Operation Hardtack), E-12 (Operation Ivy), and E-13 (Operation Dominic I).

Safety Plan which, according to [appellants] at first lacked but later contained a plan for decontamination.[7] The Safety Plan described anticipated radiation hazards, established exposure limits, and assigned responsibility for protecting personnel against exposure to unknown hazards.[8]

"[Appellants'] contention is that the government's scientists who prepared the plan 'failed to appreciate or prepare for the magnitude of the hazards that would result.' Plaintiffs' Statement of Facts at 16. They argue that 'AEC and military officials were responsible for developing safety plans to carry out Presidential and cabinet and agency-level directives to conduct the planned detonations without unduly jeopardizing the safety of the participants; for ensuring that all participants except those performing unusual or high priority missions such as cloud sampling were not subjected to radiation doses exceeding the exposure limits established by the plan; and for following other safety guidelines established in the plan, such as decontamination measures and use of protective clothing and gear. . . . There is substantial evidence that their negligent failure to carry out these operational tasks resulted in the overexposure of many hundreds or thousands of test participants, including the safety monitors themselves.' Plaintiffs' Op.Br. at 30.

"The nuclear weapons tests on which these actions are founded were carried out pursuant to specific legisla-

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7. Government Exhibits E-7.3 to E-7.7. Extensive Safety Plans were a part of the Operation Plan for each test. *See, e.g.*, Operation Plan for Operation Castle, Government Exhibit E-9, at N-I to N-III-2.

8. Plaintiffs' Statement of Facts, at 11-16.

tive authority in the 1946 Atomic Energy Act, and its successor, the 1954 Atomic Energy Act, 42 U.S.C. § 2011 *et seq.*, and presidential order.[9] They were conducted for the purpose of developing and testing weapons and discovering their effects, an inherently dangerous undertaking. The Safety Plan developed for each test series was designed to minimize exposure to radiation consistent with the purposes of the tests. The Plan provided that '[r]adiological safety of all military and civilian personnel is a command responsibility.'[10] While the Plan established radiation exposure limits, it was subject to the authority of the officer in charge of any particular test, who could permit exposure in excess of the established level if the exigencies of the situation required. Thus the Plans specified that compliance with exposure limits was conditioned upon operational requirements:

> Due to the special nature of field tests it is considered that a policy of strict adherence to the radiological standards prescribed for routine work is not realistic. The regulations set forth herein have been designed as a reasonable and safe compromise considering conservation of personnel exposures, the international import of the test and the cost aspects of operational delays chargeable to excessive radiological precautions. In all cases other than emergencies or tactical situations, the ultimate criteria will be limited by the MPE's [maximum permissible exposure] for personnel. Special instances may arise . . . in which operations will be carried out without regard to the MPEs and MPLs [maximum permissible level] prescribed herein. For such emergency or tactical op-

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9. See Government Exhibits E-14 to E-26.4.

10. Government Exhibit I-4, at 1. *See also* Government Exhibits J-5, at 3; I-1, at 3; E-11, at K-1; J-3 at 1.

> erations the criteria prescribed below for tactical situations will be used as a guide.[11]

"The Safety Plan incorporated into the Operation Plan contemplated that judgments and decisions concerning exposure to radiological hazards and the degree of protection to be afforded would be made in the light of the objectives and the needs of the test program. Safety decisions, therefore, were a part of the policy decisions made in the conduct of the weapons tests, [] and they fall squarely within the articulation in *Dalehite* that

> [w]here there is room for policy judgment and decision there is discretion.

346 U.S. at 36, 73 S.Ct. at 968. That those judgments and decisions may have been made by scientists or other operational personnel does not affect the application of the discretionary function exception. As stated by the Court in *Varig*, 'it is the nature of the conduct, rather than the status of the actor, that governs whether the discretionary function exception applies. . . .' [467 U.S. at 813], 104 S.Ct. at 2765.[12]

"In these actions, the decisions concerning safety were in the first instance made by those charged with the preparation of the Operation Plan and its components.

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11. Joint Task Force Seven, Command Task Group 7.3, *Operation Plan*, December 7, 1953, Government Exhibit J-21, at G-I-1. *See generally* references cited in Government Memo, in Support of Summary Judgment (Discretionary Function) [].

12. The pre-*Varig* criterion of looking at whether the decision was made at the planning level or operational level is no longer valid in view of the Supreme Court's statement in *Varig*. *See also Begay v. United States*, 768 F.2d 1059, 1062-63 n.2 (9th Cir.1985).

The responsibility for carrying out the Safety Plan was assigned to the officials in charge of the tests who had discretion to adopt and modify the Plan as necessary to achieve the objectives of the test. A court would be ill-equipped to evaluate the judgments concerning safety made by those officials based on the exigencies of the moment. Any attempt to do so would, moreover, require a comprehensive reexamination of the conduct of the tests and the decisions made during their course which would itself defeat the purpose of the exception. The consequences of such a reexamination would be to hamper the government in its future conduct of weapons tests and similar operations affecting the national security.[13]

[Finally, the appellants argue that the discretionary function exception does not bar their challenge to the government's alleged negligent failure to supervise the contractor's compliance with the safety procedures and guidelines established by the Safety Plan. Appellants rely heavily on *Gardner v. United States,* 780 F.2d 835 (9th Cir.1986) for the proposition that, under California law, there is a "nondelegable duty to ensure adequate safety precautions were taken by an independent contractor" where the work to be performed involves special dangers. *Garnder,* 780 F.2d at 837 (citing *Rooney v. United States,* 634 F.2d 1238 (9th Cir.1980)). Furthermore, the United States can be liable under the FTCA for breaching this non-delegable duty. *Gardner,* 780 F.2d at 837. This case is

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13. The appropriateness of deciding issues of governmental immunity on summary judgment to avoid unnecessary inquiries disruptive of effective government was stressed by the Supreme Court in *Harlow v. Fitzgerald,* 457 U.S. 800, 816-17, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982).

clearly distinguishable. The discretionary function exception was not raised nor discussed. Furthermore,

> It is irrelevant to the discretion issue whether the AEC or its employees were negligent in failing to adequately protect the public. *See Cisco v. United States,* 768 F.2d 788, 789 (7th Cir.1985); *General Public Utilities Corp. v. United States,* 745 F.2d 239, 243, 245 (3d Cir.1984), *cert. denied,* 469 U.S. 1228, 105 S.Ct. 1227, 84 L.Ed.2d 365 (1985). [] When the conduct at issue involves the exercise of discretion by a government agency or employee, § 2680(a) preserves governmental immunity 'whether or not the discretion involved be abused.' "

Allen v. United States, 816 F.2d 1417 (10th Cir.1987) (footnotes omitted). *See also Cunningham v. United States,* 786 F.2d 1445 (9th Cir.1986) (negligent failure to inspect falls within discretionary function exception—"When an agency determines the extent to which it will supervise the safety procedures of private individuals, it is exercising discretionary regulatory authority of the most basic kind." (quoting *Varig,* 467 U.S. at 819-20, 104 S.Ct. at 2767)).

Furthermore, the Act is specifically limited to claims "for injury, loss of property, personal injury, or death due to exposure to radiation based on acts or omissions *by a contractor* in carrying out an atomic weapons testing program under a contract with the United States." 42 U.S.C. § 2212(a)(1) (emphasis added). Section 2212 is not designed to cover the negligence of the government itself.]

"Accordingly, [Appellants'] claims based on failures to take adequate safety precautions at tests must be dismissed. [footnote omitted].

[b]. Claims Based on the Government's Failure to Issue Warnings Prior to 1977.

"[Appellants'] second category of claims is based on the breach of the government's alleged duty to warn [appellants] of the dangers to which they had been exposed or to monitor test participants for health problems resulting from radiation exposure. [This court] has postulated that California courts would impose a duty on the government to warn test participants of the dangers to which they have been exposed. *See Molsbergen v. United States*, 757 F.2d 1016, 1020-25 (9th Cir. 1985). Such a duty would exist when a test participant could show that (1) the government has information relating to a serious risk to the life, safety or health of a participant; (2) the conduct of the government gave rise to the risk; (3) the burden resulting from imposition of a duty to warn is not onerous; and (4) there is reason to believe that a warning would have some practical effect. *Id.* For purposes of this ruling, it is assumed that the government failed to provide [appellants] with any warning of the health risks of exposure to radiation until 1977.

"The government's motion is not directed at whether it had a duty to warn. Rather, the government argues that in these cases the government's failure to warn involved the failure to perform a discretionary function and that the claims are therefore barred.

"Assuming the government had a duty to warn, the threshold question in determining whether the discretionary function applies is what, if any, warning measures it was obliged to undertake on behalf of test participants prior to 1977. This is not a case of failing to warn river

users of a hidden obstruction beneath the surface, *Lindgren v. United States,* 665 F.2d 978 (9th Cir. 1982); or park users of the risk of flash floods, *Ducey v. United States,* 713 F.2d 504 (9th Cir.1983); or a treating physician of his patient's dangerous propensities, *Jablonski v. United States,* 712 F.2d 391 (9th Cir.1983). The kind of 'warning' that these cases involve is best illustrated by the program the government did undertake beginning in 1977 on the strength of findings by the Centers for Disease Control of a leukemia cluster among test participants. At that time the Defense Nuclear Agency established the Nuclear Test Personnel Review ("NTPR") program. It began to assemble and publish voluminous materials concerning radiation exposure during tests and to calculate levels of exposure of personnel. Beginning in 1979, test participants whose records indicated significant radiation exposure were notified and provided with medical examinations. The notification and examination program was gradually expanded to include personnel who had received lower doses. It was also extended to the Department of Health, Education and Welfare which began to conduct studies and a public information program.[14]

"The decision to embark on this program entailed a commitment of substantial resources, including the assignment of a large number of employees and the expenditure of large sums of money. The initial costs of the NTPR alone was $6,000,000 per year. The program required difficult judgments balancing the magnitude of the risk from

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14. *See* the discussion and references cited at Government Memo, in Support of Summary Judgment (Discretionary Function) []; Government Reply Memo [].

radiation exposure—of which there was only fragmentary knowledge—against the risks and burdens of a public program. Those risks included the potential consequences of creating public anxiety and the health hazards inherent in the medical responses to the warning.[15]

"Thus any decision whether to issue warnings to thousands of test participants of possibly life-threatening dangers and to provide them with appropriate examinations and counseling calls for the exercise of judgment and discretion at high levels of government. The difficulty of such decisions is illustrated simply by the problem of how to phrase such a warning where the degree of exposure of any particular participant and the consequent risk is not

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15. *See* E. Robin, *Matters of Life & Death: Risks v. Benefits of Medical Care* (1984), which discusses the health hazards inhering in any wide-spread campaign to warn against and detect disease. Diagnostic tests, by reason of the intrusive procedures used, false positive indications, and sometimes unwarranted psychological effects, produce their own adverse consequences which must be taken into account.

The experience under the government's 1976 Swine Flu Program illustrates the hazards of a hasty reaction to a health program, the dimensions and seriousness of which are not yet known at the time. Although the probability of an epidemic was never established, the public was strongly urged to submit to immunization with little advice respecting its attendant hazards. R. Neustadt, *Swine Flu Affair: Decision-Making on a Slippery Disease* 86-97 (1978); Gray, "Complexities of Informed Consent," 437 *Annals Am. Academy Pol. & Soc. Sci,* 37, 44 (May, 1978); Centers for Disease Control, *Public Attitudes Toward the Swine Flu Immunization Program and Medical Coverage of Events 2-7* (1981). The government's experience with the swine flu program highlights the policy and cost/benefit tradeoffs involved in large-scale public responses to perceived health problems.

known.[16] A decision must also take into account sensitive questions concerning its impact on on-going and future tests and on the military and civilian participants.[17]

"In no sense can such a decision be equated with decisions to warn of submerged obstructions to navigation or flash floods.[18] Courts cannot be considered qualified to evaluate such a decision and any attempt to do so is likely to interfere with important governmental activities. Formulating and issuing warnings requires the government 'to establish priorities for the accomplishment of its

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16. Not the least of the problems the government would face is that once having undertaken to issue a "warning", it may come under an obligation to exercise due care toward members of the public relying on it. *See Indian Towing Co. v. United States*, 350 U.S. 61, 69, 76 S.Ct. 122, 126, 100 L.Ed. 48 (1955) (not decided under the discretionary function exception).

17. Studying the psychological reactions of troops to nuclear weapons during field tests was a specific goal of many of the tests. *See, e.g.*, Characteristics of Troops with Varying Levels of Information about Atomic Effects, Government Exhibit D-67; Memorandum for the AEC Chairman, July 16, 1951, Government Exhibit K-14. To carry out such studies and achieve test objectives, the government needed complete control over information supplied to the troops. Troops were to be indoctrinated on how to conduct themselves on the nuclear battlefield. As one officer explained, the goal was to teach soldiers to respect radioactivity, not to fear it. Capt. Frank Winant, Command Problems of Atomic Defensive Warfare, Sept. 1947, Government Exhibit J-13.

18. *See, Begay v. United States*, 768 F.2d 1059 (9th Cir.1985); *First Nat'l Bank in Albuquerque v. United States*, 552 F.2d 370, 374-77 (10th Cir.), *cert. denied*, 434 U.S. 835, 98 S.Ct. 122, 54 L.Ed.2d 96 (1977) (decision by Department of Agriculture whether label on fungicide complied with statutory requirements that it contain a warning "necessary and if complied with adequate to prevent injury" fell within discretionary function exception).

policy objectives by balancing the objectives sought to be obtained against such practical considerations as staffing and funding.' *Varig,* [467 U.S. at 820], 104 S.Ct. at 2768. The conclusion is inescapable that every aspect of a warning program is a matter that falls within the discretionary function exception as defined in *Dalehite* and *Varig:*

> Where there is policy judgment and decision there is discretion.

346 U.S. at 36, 73 S.Ct. at 968. The decisions of [this court], discussed in the immediately preceding section, compel the same result.

"[Appellants] argue that the discretionary function exception cannot apply in the absence of a 'conscious decision.'[19] The statute is not so limited; it exempts '[a]ny

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19. *See Allen v. United States,* 588 F.Supp. 247, 337-40 (D. Utah 1984).

[The district court's decision in *Allen* was overturned by the Tenth Circuit in *Allen v. United States,* 816 F.2d 1417 (10th Cir.1987). In that opinion, the Tenth Circuit specifically rejected the District of Utah District Court's "deliberate choice" or "conscious decision" analysis which was heavily relied upon by the appellants in this case. The Tenth Circuit held:

> It is also irrelevant whether the alleged failure to warn was a matter of "deliberate choice," or a mere oversight. *See Allen,* 588 F.Supp. at 337-38. We agree with the treatment of this distinction in *Myslakowski v. United States,* 806 F.2d 94 (6th Cir.1986), *cert. denied,* — U.S. —, 107 S.Ct. 1608, 94 L.Ed.2d 793 (1987):
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> "The critical error in the trial court's analysis is in its conclusion that because the evidence does not show that the departmental policymakers evaluated the pros and cons

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claim based upon . . .the failure to exercise or perform a discretionary function . . .' 28 U.S.C. § 2680(a). The language is directed at the nature of the conduct, and does not require an analysis of the decision-making process. *Cf. General Public Utilities Corp. v. United States*, 745 F.2d 239, 245 (3d Cir.1984), *cert. denied*, 469 U.S. 1228, 105 S.Ct. 1227, 84 L.Ed.2d 365 (1985) (the exemption is based on the nature of the conduct, 'not whether there is an option to choose'). When enacting §§ 2680, 'Congress exercised care to protect the Government from claims, *how-*

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of requiring that a warning be given concerning the rollover propensity of the jeep and then made a discretionary decision not to give such warnings, it therefore follows that no discretionary decision, of the kind contemplated by § 2680(a), was made. . . .

Stated otherwise, even the negligent failure of a discretionary government policymaker to consider all relevant aspects of a subject matter under consideration does not vitiate the discretionary character of the decision that is made.

Indeed, it is, in part, to provide immunity against liability for the consequences of negligent failure to consider the relevant, even critical, matters in discretionary decisionmaking that the statutory exception exists. If it were otherwise, a judgment-based policy determination made at the highest levels, to which all would concede that the statutory exception applies (the decision to sell surplus jeeps), 'would result in no immunity if the decision could be shown to have been made without consideration of important, relevant factors, or was a decision negligently reached. If that reasoning were sound, the discretionary function exception would be inapplicable in every case in which a negligent "failure to consider' a relevant risk could be proved." *Id.* at 97-98. *Accord In re Consolidated United States Atmospheric Testing Litigation*, 616 F.Supp. 759, 776-77 (N.D.Cal.), *appeal docketed*, No. 85-2842 (9th Cir.1985).

Allen, 816 F.2d at 1422 n. 5.]

ever negligently caused, that affected the governmental functions.' *Dalehite*, 346 U.S. at 32, 73 S.Ct. at 966 (emphasis added).

"If the decision to issue or not to issue a 'warning' is within the discretionary function exception, then logically the failure to consider whether to issue one neecssarily falls within the exception as well. Any other interpretation of the statute would create insurmountable problems in its administration: What would constitute a 'decision'? Would a decision to defer decision be a 'decision'? Would the government be subject to liability for failing to act where operational employees conducting the relevant research consider the evidence as yet insufficient for making a decision? As the Supreme Court said in *Varig*, one must look to 'the nature of the conduct' to determine whether the exception applies. In this case, the relevant conduct is the issuance of 'warnings,' not the decision-making process or the failure to make a conscious, explicit decision.

"Accordingly, plaintiffs' claims based on the failure to issue warnings must also be dismissed".[20]

C. *Broudy* Appeal

Appellant Alice Broudy, decedent's wife, appeals from the United States District for the Central District of California's granting of the government's motion for summary judgment. In granting that motion, the Honorable Judge Laughlin E. Waters adopted the reasoning of the decision

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20. Because we dismiss all appellants' claims under the discretionary function exception, we do not reach the *Feres* doctrine, foreign country exception or the combatant activities exception.

in *In re Consolidated United States Atmospheric Testing Litigation*, 616 F.Supp. 759 (D.C.Cal.1985) ("Konizeski appeal") and held, *inter alia*, that the discretionary function exception barred Broudy's post-discharge failure to warn and her medical malpractice claims. We affirm.

Major Broudy served as an officer in the U.S. Marine Corps from 1944 to 1960. In 1957, Major Broudy was ordered to participate in military exercises near two atmospheric tests conducted in Nevada.

Major Broudy was honorably discharged in 1960. He received medical care for various health problems at the Marine Corps medical facility at El Toro. He was never informed of nor warned about the dangers associated with his exposure to radiation. In 1976, he was diagnosed as having lymphosarcoma, a form of cancer that has been related to radiation exposure. He died from that disease in 1977.

Broudy, by stipulation, joined in all arguments and precedent advanced by the appellants in the Konizeski appeal on the issue of the government's post-discharge failure to warn and the applicability of the discretionary function. For the same reasons and policy considerations stated above in the Konizeski appeal, we find that the government's post-discharge failure to warn Major Broudy of any harm arising from his exposure to radiation is barred by the discretionary function exception to the FTCA.

Broudy has attempted to distinguish her husband's case from the Konizeski appellants by asserting a medical malpractice claim. Specifically, she contends the medical

personnel at the El Toro Medical Facility committed medical malpractice when they failed to warn Major Broudy of the dangers of radiation exposure when he went to the facility for post-discharge treatment. The district court held that this medical malpractice claim was barred for failure to state a sufficient claim to the appropriate federal agency. We agree.

28 U.S.C. § 2675(a) provides that as a prerequisite to maintaining a suit under the FTCA, a plaintiff must first present the claim to the appropriate federal agency. By enacting the notice requirement, Congress sought to ensure that plaintiffs "would promptly inform the relevant agency of the accident so that it may investigate the claim and respond either by settlement or by defense." *Broudy v. United States*, 722 F.2d 566, 568 (9th Cir.1983) (quoting *Adams v. United States*, 615 F.2d 284, 289 (5th Cir. 1980)). The purpose of this notice requirement is to give the relevant agency an opportunity to commence an investigation into the claim. *See Broudy*, 722 F.2d at 568. Broudy's administrative claim was filed with the Department of Energy ("DOE"). The Department of Defense ("DOD") controls the medical facility at El Toro. The DOD received no notice of Broudy's claim. As a consequence, the DOD was unable to initiate an investigation into her claims. We agree with the district court that Broudy's medical malpractice claim is barred because she failed to file the claim with the DOD which was the appropriate federal agency.

The judgments are AFFIRMED.

IN re CONSOLIDATED UNITED STATES ATMOSPHERIC TESTING LITIGATION.

No. C-84-0022-WWS.

United States District Court,
N.D. California

Aug. 28, 1985.

As Corrected Sept. 19, 1985.

MEMORANDUM OF OPINION AND ORDER

WILLIAM W SCHWARZER, District Judge.

Before the Court are forty-three consolidated actions asserting claims arising out of alleged exposure to nuclear radiation resulting from the bombing of Hiroshima or subsequent atmospheric testing of nuclear weapons. Most of the persons on whose behalf actions are brought were members of the military at the time of their alleged exposure.[1] Others participated in nuclear weapons tests as civilians.[2]

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1. Following are the actions brought by or on behalf of servicemen and the dates and locations of their radiation exposure:

Action	*Plaintiff*	*Test*	*Year*
Japan Detonations			
83-2989 84-3210	Molsbergen	Nagasaki	1945
84-2785	Minarik	Hiroshima/Nagasaki	1945
83-0309 83-1291	Solano	Hiroshima/Nagasaki	1945
Pacific Detonations			
82-1405	Beaman	Crossroads	1946
82-5902 83-0008	Benson	Crossroads	1946

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Action	*Plaintiff*	*Test*	*Year*
82-6372	Carsillo	Crossroads	1946
83-0009			
83-2248	Collins	Crossroads	1946
83-0308	Corday	Crossroads	1946
83-1292			
83-3061	DeMuth	Crossroads	1946
84-3259	Erspamer	Crossroads	1946
82-6494	Estes	Crossroads	1946
83-1289			
83-0188	Ferguson	Crossroads	1946
83-1290			
83-4848	Guarisco	Crossroads	1946
84-0310			
83-4849	Milne	Crossroads	1946
83-4847	Paskett	Crossroads	1946
82-3115	Saraiva	Crossroads	1946
83-4496	Van Winkle	Crossroads	1946
82-5812	Williams	Greenhouse	1951
83-0945	Blake	Castle	1953-54
83-5758			
83-4842	Porambo	Castle	1954
83-1391	Dixon	Redwing	1956
83-3051			
83-4844	Fassett	Dominic II	1962
Nevada Detonations			
81-0734	Konizeski	Ranger and/or Buster/Jangle	1951
81-1511	Sanders	Ranger and/or Buster/Jangle	1951
82-4845	Fond	Upshot Knothole	1953
83-4841	Hoffmeister	Upshot Knothole	1953
83-5402			

In addition, decedent Smith allegedly participated in the Ivy (1952), Castle (1954), and Hardtack I (1958) tests in the Pacific as a serviceman, and in the Dominic I test in the Pacific as a civilian. *Harrison v. United States*, 83-5307.

2. Following are the actions brought by or on behalf of civilian plaintiffs and the dates and locations:

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Defendants are the United States Government and contractors who participated in the nuclear weapons testing program.[3]

The government has moved pursuant to 42 U.S.C. § 2212, to be substituted for the contractors as defendant in these actions, and the contractors have joined in that motion.[4] In addition, the government has moved to dismiss

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Action	*Plaintiff*	*Test*	*Year*
Pacific Detonations			
84-2468	Green	Greenhouse	1951
82-3116	Stephens	Castle	1953-54
82-3114	King	Castle	1954
	King	Wigwam	1955
	King	Hardtack I	1958
85-2138	Hinkle	Redwing	1956
Nevada Detonations			
83-5642	Ryder	Unknown	Unknown

See also Harrison v. United States, 83-5307, cited in note 1 *supra.*

3. Contractors named as defendants include the University of California, American Telephone and Telegraph Company (including its affiliates Sandia Corporation, AT & T Technologies, Inc., and AT & T Bell Laboratories), and Reynolds Electrical and Engineering Co., Inc. (collectively "the contractors").

4. Plaintiff Ryder alleges in his complaint (83-5642) that his injuries were incurred while he was employed at the University of California before the University became a government contractor in the nuclear weapons testing program. That action, therefore, is not entirely subject to the substitution provisions of § 2212. Inasmuch as Ryder concedes that he received compensation for his injuries through Workers Compensation, it is difficult to see what if any claim he could now assert against the University. His action will be severed and Ryder shall have thirty days from the date of this order to submit and serve declarations and documents containing facts to support his claim. The Court will then determine whether the action survives the summary judgment motion.

or for summary judgment in all actions based on exceptions to its liability under the Federal Tort Claims Act, (the "FTCA"), 28 U.S.C. § 2680.

I. *Factual Background*[5]

The atmospheric nuclear weapons tests giving rise to these actions took place between the closing days of World War II and the adoption of the Partial Nuclear Test Ban Treaty in 1963. Even before these tests, the United States Government had enlisted the scientific resources of industrial firms and universities in the program to develop an atomic bomb. The Manhattan Project, which ultimately produced the bomb detonated over Hiroshima, was an unprecedented joint effort by the government, universities and industry.

Immediately following the end of World War II, the military services proposed a series of tests to determine the effects of atomic weapons. On orders of the President, a joint military task force was established to conduct the first of these tests, Operation Crossroads, at Bikini Atoll. The task force, commanded by an admiral, comprised 42,000 military and civilian personnel and numerous ships and aircraft.

In 1946, Congress adopted the Atomic Energy Act, (the "AEA"), establishing a national policy for the development and control of nuclear weapons. Under the AEA, authority was transferred from the military to the Atomic Energy Commission, (the "AEC"), which was

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5. See *generally* the government's and plaintiffs' statements of facts in support of their motions and referenced exhibits. The facts material to the disposition of these motions are not in dispute.

to operate a "program of federally conducted research and development" with the "paramount objective of assuring the common defense and security." AEA, P.L. No. 585, ch. 724, 60 Stat. 755, §§ 1(a), (b)(3) (current version at 42 U.S.C. § 2011 *et seq.*). To this end the AEC was authorized to conduct experiments, undertake research, and develop the military applications of atomic energy either in its own facilities or pursuant to arrangements with public or private institutions. *Id.* at § 4(c)(2). All right, title and interest in fissionable material was vested in it. *Id.* at §§ 4(b), 5(a)(2). The production of atomic bombs and bomb parts was authorized, but "only to the extent that the express consent and direction of the President of the United States has been obtained. . . ." *Id.* at § 6(a)(2). In addition, Congressional oversight of the AEC's activities was established by creation of the Joint Committee on Atomic Energy. *Id.* at § 15(a). The AEA thus established a program of pervasive "[g]overnmental control of the production, ownership, and use of fissionable material," including the development and testing of nuclear weapons. *Id.* at § 1(b)(4).

When the AEC took over the nuclear weapons program from the military, it acquired a complex of plants, laboratories and other facilities staffed by some 2,000 military personnel, 4,000 civilian government employees and 38,000 employees of contractors. The integral role of contractors, which started in the Manhattan Project, continued under the AEC. The University of California, Sandia Corporation and Reynolds Electrical and Engineering Co., Inc., were among those contractors.

Escalating international tensions, marked by the Berlin blockade in 1948, the confrontation with the Soviet Un-

ion over Czechoslovakia, Greece and Iran, the detonation by the Soviet Union of an atomic device in 1949, and the Korean War led the government to assign the highest priority to the development and production of nuclear weapons. Weapons tests were an essential part of that effort.

These tests were regarded as critical to national security. Presidents Eisenhower and Kennedy and the Chairman of the AEC made public statements stressing the vital importance of tests to the development of modern weapons needed to assure national security in the face of the threat posed by the Soviet Union. Indeed, atmospheric nuclear weapons testing was a major issue in United States-Soviet relations during this period. Beginning in 1955, testing was a topic in the disarmament negotiations. In 1958, a moratorium on tests was agreed on and was observed until the Soviet Union resumed atmospheric testing in 1961. The United States followed suit to counteract qualitative improvements in Soviet weapons. In 1963, atmospheric nuclear tests were finally banned by the Partial Nuclear Test Ban Treaty.

From 1947 through 1963, the AEC in conjunction with the Department of Defense conducted 21 test series, some of which are the subject of these actions. These tests had a number of objectives, including developing weapons, planning their tactical and strategic use, determining how targets could be given protection, assessing the vulnerability of troops to the effects of detonations, and improving radiological safety. A particular objective of the tests was to determine the effects of nuclear explosions on the equipment, clothing, weapons and fighting capability of

military personnel. The tests were coordinated with studies conducted at laboratories operated by contractors.

Every phase of the preparation and implementation of each nuclear weapons test series was closely controlled and supervised by government officials. Initially, proposals for tests had to be approved at various levels by the responsible divisions of the AEC and the Department of Defense. Before any test took place, a detailed Operation Plan had to be reviewed and approved by the AEC, by the National Security Council, and finally by the President.

Tests at the Pacific Proving Ground were under the control of a joint task force commander, appointed by the AEC and the Joint Chiefs of Staff. At the Nevada Test Site, tests were under the control of Test Manager designated by the AEC. Tests were conducted in conformity with the approved Operation Plan, which incorporated radiation exposure limits established by the AEC applicable to both military and civilian personnel. Various military and civilian committees and medical and scientific experts took part in making the decisions which were incorporated into the Operation Plan. Designated units in each test organization were assigned responsibility for radiological safety.

Nuclear weapons testing was known to be an inherently dangerous activity. Aside from the recognized radiation hazards, the risks included the dangers associated with any explosive devices, the effects of unpredictable meteorological conditions, and the risks of injury inherent in any large-scale military operation.

The need to balance risks against test objectives was particularly acute in tests involving troop maneuvers.

These tests were intended to expose troops to battlefield conditions to test psychological reactions and protective measures. The location and movement of those troops was a subject of controversy between the AEC and military commanders. It was recognized that the desire of the military to expose troops to realistic combat conditions could interfere with the AEC's weapons testing objectives. The arrangements ultimately incorporated in the Operation Plans represented an accommodation of these divergent requirements by the AEC and military officials. In later tests, involving large scale military maneuvers under battlefield conditions, these considerations led to delegation of responsibility for radiological and physical safety of troops to the military commanders.

II. *Motions to Substitute*

A. *The Provisions and Effect of § 2212*

In October 1984, Congress adopted § 1631 of the Department of Energy National Security and Military Applications of Nuclear Energy Authorization Act of 1985, (the "Act"), codified at 42 U.S.C. § 2212. It provides that an action against the United States shall be the exclusive remedy for injuries "due to exposure to radiation based on acts or omissions by a contractor in carrying out an atomic weapons testing program under a contract with the United States," § 2212(a)(1), and requires any action against these contractors to be maintained solely against the United States pursuant to the FTCA. The Act applies to alleged acts or omissions of contractors "without regard to when the act or omission occurred." § 2212(a)(2).

The Act provides, in pertinent part, that:

> A contractor against whom a civil action or proceeding described in subsection (a) . . . is brought shall promptly deliver all processes served upon that contractor to the Attorney General of the United States. *Upon certification by the Attorney General* that the suit against the contractor is within the provisions of subsection (a) . . . , a civil action or proceeding commenced in a State court shall be removed without bond at any time before trial by the Attorney General to the district court of the United States for the district and division embracing the place wherein it is pending and *the proceedings shall be deemed a tort action brought against the United States.* . . . For purposes of removal, the certification by the Attorney General under this subsection establishes contractor status conclusively.

42 U.S.C. § 2212(b) (emphasis added).

A "contractor" is defined as a "contractor or cost reimbursement subcontractor of any tier participating in the conduct of the United States atomic weapons testing program. . . ." § 2212(d). Authority to certify pursuant to § 2212(b) that the action against the contractor "is based on acts or omissions by a contractor in carrying out an atomic weapons testing program under a contract with the United States" rests with the Attorney General. § 2212(a)(1).

In its statement supporting the Act, the Department of Justice explained the unique situation at which it is aimed:

> [The Act] would clarify the status of certain contractors operating government-owned facilities relating to atomic energy national defense activities in liti-

gation arising from those activities. Many actions recently have been brought against these contractors who have invaluably assisted the Government of the United States in carrying out its nuclear weapons testing program. The actions allege exposure to radiation and consequent injury or death as a result of the United States atomic weapons testing.

The provisions of the Federal Tort Claims Act determine the rights of individuals and corporate litigants to seek monetary recovery from the United States for alleged torts. Typically, the United States cannot be sued for and is not liable for the acts of independent contractors providing goods or services to the United States. However, contractors who operate nuclear weapons testing facilities for the Department of Energy or its predecessor agencies and who, as a result, have participated in the atomic weapons testing program are unique. They are not typical contract suppliers of commercially provided goods or services to the government. These contractors were and are utilized by the United States as instruments of national policy to assist in an entirely governmental task—nuclear weapons research, development and testing. Further, the government reimburses these contractors for any liability arising out of their assistance in the weapons program, including the costs of litigation. The use of the contractors to implement national policy and perform a uniquely governmental function cannot be disputed. Therefore, it should be perfectly clear that, for the purposes of civil litigation arising from atomic weapons testing, the proper party defendant is the government. Only the government sets policy, makes decisions, and controls activities and circumstances regarding atomic weapons testing.

H.R.Rep. No. 124, Part I, 98th Cong., 1st Sess. 34-35 (1983).

The report of the Senate Committee on Armed Services elaborates the Act's underlying rationale:

> Each nuclear test that has been made since 1946 has been made under the statutory direction of Congress. Each nuclear test has been approved, before the fact, by the President of the United States. Each nuclear test has been under the direct supervision of government officials. Each nuclear test has been participated in by hundreds, and in some cases thousands, of government officials and military and civilian personnel.
>
> The committee recognizes, as has the Congress, that the military applications of atomic energy could not proceed either technically or economically without the participation of organizations that possess both scientific management skills and a high degree of scientific and technical expertise. Several such organizations were placed under contract almost at the inception of the nuclear weapons program in 1942 and have performed in an outstanding manner in the national interest for more than three decades. These organizations have provided scientific, engineering and technical support for nuclear tests carried out by the government and for the government in the exercise of a governmental function, i.e., providing for the national defense. These organizations did not order the tests to be performed; they did not set the times or places for the tests; nor did they direct military or civilian government personnel to participate in them.

S.Rep. No. 500, 98th Cong., 2d Sess. 376 (1984).

The Senate Report described the effect of the legislation as follows:

> [The Act] would cause all litigation involving the atomic weapons testing program, including suits now filed against contractors, to be maintained against the

> United States under the substantive and procedural requirements of the FTCA.

Id. at 375. By its terms, however, the Act is specifically limited to claims

> for injury, loss of property, personal injury, or death due to exposure to radiation based on acts or omissions by a contractor in carrying out an atomic weapons testing program under a contract with the United States.

42 U.S.C. § 2212(a)(1).

The instant actions (with the exception of Ryder's) qualify under the Act. The Attorney General has made the statutory certification. The defendants' motions to substitute the United States as the sole defendant in these actions must be granted unless § 2212 is found to be invalid.

Plaintiffs contend that the Act should be read as authorizing only the addition of the United States as a codefendant, not the dismissal of the contractors. They rely on a statement in the Senate report suggesting such an interpretation of an earlier version of the bill:

> Without the consolidation of these many cases under the leadership of the Department of Justice, with the United States as a *codefendant*, a variety of judgments are possible based on the provisions of a different state [sic] laws and on the verdicts of juries in various state and federal courts.

S.Rep. No. 500, 98th Cong., 2d Sess. 377 (1984) (emphasis added).

The specific language of the Act as finally adopted, however, precludes such an interpretation by making the

FTCA remedy "exclusive of any other civil action or proceeding," providing that employees of the contractors "shall be considered employees of the Federal Government," and directing that actions shall proceed in the same manner as any FTCA action against the United States. The Federal Drivers Act, making its remedies "exclusive of any other civil action . . . against the employee," was held to abrogate common law actions against those employees for claims covered by the act. *See Carr v. United States*, 422 F.2d 1007, 1010 (4th Cir.1970). Congress must be presumed to have been aware of the effect given the statutory language in prior court decisions and to have intended to achieve the same effect.

B. *The Validity of § 2212*

The effect of § 2212 is to substitute the remedy against the government under the FTCA for any cause of action against the contractors arising under state law. In adopting this legislation, Congress broke no new ground. In a number of other acts, Congress substituted the FTCA remedy against the government for remedies available against private parties, and these acts have been uniformly upheld. *See Ducharme v. Merill-National Laboratories*, 574 F.2d 1307 (5th Cir.), *cert. denied*, 439 U.S. 1002, 99 S.Ct. 612, 58 L.Ed.2d 677 (1978) (Swine Flu Act); *Carr v. United States*, 422 F.2d 1007 (4th Cir.1970) (Federal Drivers Act). *See also* 42 U.S.C. § 233 (Public Health Service medical personnel); 38 U.S.C. § 4116 (Veterans Administration medical personnel); 22 U.S.C. § 817(a) (State Department medical personnel); 10 U.S.C. § 1089(a) (Armed Forces medical personnel).

The effect of all of those acts has been to foreclose trial by jury and to subject plaintiffs' claims to the de-

fenses available to the government, such as the discretionary function exception and the *Feres* doctrine, *Feres v. United States*, 340 U.S. 135, 71 S.Ct. 153, 95 L.Ed. 152 (1950). It is too late in the day, therefore, to challenge the Act on the ground that it curtails the scope of the available remedy and in some cases has the effect of barring it altogether.

Moreover, these consolidated actions present perhaps the most compelling case for substituting the government as the sole defendant. The Act applies only to activities conducted under the closest control of the government, undertaken on authority from the President, capable of being performed solely by the government and inextricably interwoven with national security. Thus, to the extent due process requires demonstration of a rational basis for legislation controlling claims arising out of these activities, that requirement is amply met. *See Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 98 S.Ct. 2620, 57 L.Ed.2d 595 (1978) (upholding Price-Anderson Act limitation on liability of government licensees for nuclear incidents against substantive due process challenge).

A question as to the validity of the Act arises solely because it applies to pending actions. It thereby raises issues under the Fifth Amendment and under the separation of powers doctrine.[6]

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6. Plaintiffs also argue that the Act violates their Seventh Amendment right to a jury trial. That argument is foreclosed, however, by the Court's conclusion, discussed *infra*, that the retroactive application of preclusive defenses is not barred by the Constitution.

1. *Fifth Amendment Issues*

A cause of action has been described as "a species of property protected by the Fourteenth Amendment's Due Process Clause." *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 428, 102 S.Ct. 1148, 1154, 71 L.Ed.2d 265 (1982) (quoting *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313, 70 S.Ct. 652, 656, 94 L.Ed. 865 (1950)). *See also In re Aircrash in Bali, Indonesia on April 22, 1974*, 684 F.2d 1301, 1312 (9th Cir.1982) (dictum).[7] To say that a cause of action is a species of protected property, however, is not to answer the question of what process is due. A cause of action is property of a substantially different nature than real or personal property or vested intangible rights. It is inchoate and affords no definable or enforceable property right until reduced to final judgment. *Cf. Armstrong v. United States*, 364 U.S. 40, 80 S.Ct. 1563, 4 L.Ed.2d 1554 (1960) (state law materialman's lien entitling supplier to resort to specific property to satisfy claims is a property right compensable under fifth amendment); *Lynch v. United States*, 292 U.S. 571, 579, 54 S.Ct. 840, 843, 78 L.Ed. 1434 (1934) contract rights are property rights compensable under fifth amendment).

A cause of action does not afford the holder the traditional bundle of rights associated with the ownership of property. *Cf. United States v. Security Industrial Bank*, 459 U.S. 70, 75-76, 103 S.Ct. 407, 410-11, 74 L.Ed.2d 235

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7. In *Bali*, the court of appeals in dictum postulated that wrongful death claims are property within the meaning of the just compensation clause. The court, however, reserved the question whether the Warsaw Convention, limiting the amount recoverable in a wrongful death action, constituted a compensable taking.

(1982). Instead, it represents a right to assert a claim for compensation or some other form of judicial relief. Its value is contingent on successful prosecution to judgment. Thus, to the extent it is entitled to due process protection, that protection focuses on assuring access to fair procedures for its prosecution. The notion of due process relevant to causes of action is that "deprivation . . . by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case." *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313, 70 S.Ct. 652, 656, 94 L.Ed. 865 (1950).[8]

That a cause of action may consistent with due process be impaired or lost before final judgment by events extraneous to the litigation is beyond question. In the leading case of *In re Schooner Peggy*, 5 U.S. (1 Cranch) 103, 2 L.Ed. 49 (1801), Chief Justice Marshall said:

> [I]f, subsequent to the judgment, and before the decision of the appellate court, a law intervenes and positively changes the rule which governs, the law must be obeyed, or its obligation denied. If the law be constitutional . . . I know of no court which can contest its obligation. It is true, that in mere private cases between individuals, a court will and ought to struggle hard against a construction which will, by a retrospective operation, affect the rights of parties, *but in great national concerns . . . the court must decide accord-*

8. Procedural due process does not, however, extend to the adoption of the Act itself, as plaintiffs argue. *Bi-Metallic Investment Co. v. Board of Equalization of Colorado*, 239 U.S. 441, 36 S.Ct. 141, 60 L.Ed. 372 (1915); *Minnesota State Board for Community Colleges v. Knight*, 465 U.S. 271, 104 S.Ct. 1058, 79 L.Ed.2d 299 (1984). The requirements of procedural due process are satisfied by the proceedings in this Court on plaintiffs' claims.

> *ing to existing laws*, and if it be necessary to set aside a judgment, rightful when rendered, but which cannot be affirmed, but in violation of law, the judgment must be set aside.

Id. 5 U.S. at 109-10 (emphasis added). In *Duke Power Co., supra*, the Supreme Court summarized the applicable principles as follows:

> Our cases have clearly established that "[a] person has no property, no vested interest, in any rule of the common law." *Second Employers' Liability Cases*, 223 U.S. 1, 50 [32 S.Ct. 169, 175, 56 L.Ed. 327] (1912), quoting *Munn v. Illinois*, 94 U.S. [(4 Otto)] 113, 134 [24 L.Ed. 77] (1877). The "Constitution does not forbid the creation of new rights, or the abolition of old ones recognized by the common law, to attain a permissible legislative object," *Silver v. Silver*, 280 U.S. 117, 122 [50 S.Ct. 57, 58, 74 L.Ed. 221] (1929), despite the fact that "otherwise settled expectations" may be upset thereby. *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 16 [96 S.Ct. 2882, 2892, 49 L.Ed.2d 752] (1976).

438 U.S. at 88 n. 32, 98 S.Ct. at 2638 n. 32.

The Supreme Court has noted a distinction between judicial decisions, which operate retrospectively, and statutes, which normally operate prospectively. *United States v. Security Industrial Bank*, 459 U.S. at 79, 103 S.Ct. at 412. But in that case the Court found only a rule of construction favoring prospective application of statutes. It found no general bar against retrospective application of statutes, and statutes have in fact been retroactively applied repeatedly. *See Dickinson Industrial Site, Inc. v. Cowan*, 309 U.S. 382, 388, 60 S.Ct. 595, 599, 84 L.Ed. 819 (1940) (retroactive application of bankruptcy rule to pending case);

Carpenter v. Wabash Railway Co., 309 U.S. 23, 60 S.Ct. 416, 84 L.Ed. 558 (1940) (retroactive application of provision giving personal injury judgment priority over mortgage lien); *Keller v. Dravo Corp.*, 441 F.2d 1239 (5th Cir. 1971), *cert. denied*, 404 U.S. 1017, 92 S.Ct. 679, 30 L.Ed.2d 665 (1972) (retroactive application of limitation in Longshoremen's and Harbor Workers Act on actions against employers).[9]

The record here demonstrates that Congress sought to deal with important national concerns arising by the proliferation of claims arising out of the nuclear weapons testing program: that negative public perception of the contractors' role in the program might jeopardize their continued participation; that actions against contractors threatened to disrupt the nuclear weapons program; and that the government was the proper party to defend claims arising out of purely governmental activities. *See generally* S.Rep. 500, *supra* at 375-77, H.R.Rep. No. 124 Part I, *supra*, at 28-30; Litigation Relating to Atomic Testing,

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9. Decisions upholding retrospective application of economic legislation which imposes added economic burdens on affected parties also provides support by analogy. *See, e.g., Pension Benefit Guaranty Corp. v. R.A. Gray & Co.*, — U.S. —, 104 S.Ct. 2709, 81 L.Ed.2d 601 (1984) (withdrawal liability under the Multiemployer Pension Plan Amendments Act retroactive for a five month period prior to its enactment). After reviewing prior decisions, the Supreme Court concluded that legislation readjusting economic rights and burdens for a rational purpose may be given limited retrospective effect consistent with due process. *See also Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 96 S.Ct. 2882, 49 L.Ed.2d 752 (1976).

Statutes, such as the Act, which by their terms operate retrospectively are also supported by the general presumption of validity which attaches to acts of Congress. *Crowell v. Benson*, 285 U.S. 22, 52 S.Ct. 285, 76 L.Ed. 598 (1932).

1983: Hearings on H.R. 2797 Before the House Subcomm. on Admin. Law and Govt'l Relations of the House Comm. on the Jud., 98th Cong., 2d Sess. 43-47, 52 (1983). The adoption of § 2212, substituing the FTCA as the exclusive remedy for pending radiation injury claims, was a valid and rational exercise of Congress' powers to address concerns touching national defense and security.

Plaintiffs argue, however, that the Act must be viewed not simply as a substitution of remedies, but rather as an abrogation of existing claims. By substituting the FTCA remedy, the claims become subject to dispositive defenses available to the government, including the *Feres* doctrine and the discretionary function exception.[10]

Several courts have considered whether Congress may abrogate pending claims. In *United States v. Heinszen*, 206 U.S. 370, 27 S.Ct. 742, 51 L.Ed. 1098 (1907), import duties on sugar had been collected without the requisite Congressional authority. After an action had been filed for refund of these illegally collected duties, Congress adopted legislation retroactively authorizing the duties. Rejecting plaintiff's argument that this legislation deprived him of property without due process, the Supreme Court held that inasmuch as Congress had the power to impose these duties in the first place, it could validly ratify their collec-

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10. The Act does not affect other remedies such as those available under veterans benefit legislation, 38 U.S.C. § 310 *et seq.*, and, in the case of the civilian plaintiffs, under the Federal Employee Compensation Act. 5 U.S.C. § 8101 *et seq.* Veterans benefit programs have recently been amended to liberalize recovery of benefits by veterans suffering from exposure to radiation. *See* Veterans' Dioxin and Radiation Exposure Compensation Standards Act, Pub.L. No. 542, 98 Stat. 2725 (1984).

tion after the fact. Even if the right to recover the payments were a vested right, the right would be subject to the Congressional power to legislate in the area. The Supreme Court said:

> But if it be conceded that the claim to a return of the moneys paid in discharge of the exacted duties was in a sense a vested right, it in principle, as we have already observed, would be but the character of right referred to by Kent in his Commentaries, where, in treating of the validity of statutes, retroactively operating on certain classes of rights, it is said (Vol. 2 pp. 415, 416)
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> > The legal rights affected in those cases by the statutes were deemed to have been vested subject to the equity existing against them, and which the statutes recognized and enforced. *Goshen v. Stonington*, 4 Connecticut 209; *Wilkinson v. Leland*, 2 Peters, 627 [7 L.Ed. 542]; *Langdon v. Strong*, 2 Vermont, 234; *Watson v. Mercer*, 8 Peters, 88 [8 L.Ed. 876]; 3 Story's Comm. on the Constitution, 267.
>
> Nor does the mere fact that at the time the ratifying statute was enacted this action was pending for the recovery of the sums paid cause the statute to be repugnant to the Constitution. The mere commencement of the suit did not change the nature of the right. Hence again if it be conceded that the capacity to prosecute the pending suit to judgment was in a sense a vested right, certainly also the power of the United States to ratify was, to say the least, a right of as high a character. To arrogate to themselves the authority to divest the right of the United States to ratify is then in reason the assumption upon which the asserted right of the claimants to recover must rest.

Heinszen, 206 U.S. at 386-87, 27 S.Ct. at 746-47.

In *Battaglia v. General Motors Corp.*, 169 F.2d 254 (2d Cir.), *cert. denied*, 335 U.S. 887, 69 S.Ct. 236, 93 L.Ed 425 (1948), plaintiffs had sued to recover additional overtime pay to which they had become entitled under a recent Supreme Court interpretation of the Fair Labor Standards Act. After the actions were filed, Congress adopted the Portal-to-Portal Act of 1947, which eliminated these overtime claims. The court held that Congress, having had the power to adopt the Fair Labor Standards Act to protect interstate commerce, had the power to adopt subsequent amendments to prevent injury to commerce. Inasmuch as the plaintiffs' right to overtime pay was subject to the Fair Labor Standards Act, it was subject also to any later amendments. *See also Seese v. Bethlehem Steel Co. Ship Building Div.*, 168 F.2d 58 (4th Cir.1948). *Cf. Louisville & Nashville Railroad Co. v. Mottley*, 219 U.S. 467, 31 S.Ct. 265, 55 L.Ed. 297 (1911) (Congress could, in the exercise of the commerce power, prohibit enforcement of contracts for free transportation valid when made).

Finally, in *de Rodulfa v. United States*, 461 F.2d 1240 (D.C.Cir.), *cert. denied*, 409 U.S. 949, 93 S.Ct. 270, 34 L.Ed. 2d 220 (1972), the district court had set aside a Veterans' Administration order and awarded benefits and attorneys' fees to plaintiffs. Congress then amended the governing statute, superceding prior decisions so as to preclude judicial review of Veterans' Administration orders. The court of appeals upheld retroactive application of the amendment, interpreting it as simply implementing Congress' preexisting intent to preclude judicial review of all benefits decisions of the Veterans' Administration.

Although these decisions do not purport to articulate a clearly defined doctrine, they reflect a coherent rationale

under which claims relating to matters within the legislative power of Congress are subject to the subsequent exercise of that power to abrogate them. *See also, Paul v. United States,* 687 F.2d 364, 231 Ct.Cl. 445 (1982), *cert. denied,* 461 U.S. 927, 103 S.Ct. 2086, 77 L.Ed.2d 297 (1983); *Inupiat Community v. United States,* 680 F.2d 122, 230 Ct.Cl. 647, *cert. denied,* 459 U.S. 969, 103 S.Ct. 299, 74 L.Ed. 2d 281 (1982).

That rationale has particular force when applied to these cases. Plaintiffs' claims arise solely out of the performance of purely governmental functions. To the extent such functions were performed by government employees, the FTCA would be the exclusive remedy. Even when performed by the contractors, they were performed under the comprehensive and pervasive direction and control of the government. The detailed Operation Plans under which the contractors functioned were the product of decisions of the AEC, the Department of Defense and the President, and were subject to oversight by the Joint Committee on Atomic Energy.

Thus the claims arise out of circumstances and activities peculiar and unique to the government as sovereign. They are the product of acts and decisions by the government undertaken for purely governmental purposes. They can in no way be equated with the claim of an injured person against a private tort feasor. *See Feres,* 340 U.S. at 141-42, 71 S.Ct. at 156-57.

These considerations, in the aggregate, present ample grounds for treating plaintiffs' claims as subject to the continuing control of Congress. Congress could, before the actions were filed, have limited the remedy for any

claims for radiation injuries resulting from nuclear weapons tests to that provided by the FTCA. The continuing concern of the government with the effective defense of claims arising out of its activity as a sovereign, the cost of such claims, and their impact on contractors on which the government depends to perform essential functions and hence on the performance of those functions provide ample ground for the exercise of continuing control over such claims, even after the comencement of litigation. Given the presumption of validity of acts of Congress, the application of § 2212 to these cases must be upheld.

Plaintiffs also contend that the Act, even if valid as applied to them, results in a compensable taking. In a classic example of understatement, the Supreme Court has said that "[t]he question of what constitutes a 'taking' for purposes of the Fifth Amendment has proved to be a problem of considerable difficulty." *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 123, 98 S.Ct. 2646, 2658, 57 L.Ed.2d 631 (1978). It is helpful at the outset to recognize that " '[a] claim of *deprivation* of property without due process of law cannot be blended as one and the same with the claim that property has been *taken* for public use without just compensation.' " *Kizas v. Webster*, 707 F.2d 524, 539 (D.C.Cir.1983), *cert. denied*, — U.S. —, 104 S.Ct. 709, 79 L.Ed.2d 173 (1984) (quoting J. Sackman, *Nichols' The Law of Eminent Domain* § 4.3 at 187 rev. 3d ed. cum. supp. 1982) (emphasis in original). The Court has heretofore concluded that the requirements of due process have been satisfied.

While a cause of action is considered to be a species of property, as heretofore discussed, those words do not

transiate into a cognizable taking claim. *See In re Aircrash in Bali, Indonesia on April 22, 1974*, 684 F.2d 1301, 1312 (9th Cir.1982). Whether such a claim exists is subject to an "essentially ad hoc, factual inquir[y]." *Penn Central*, 438 U.S. at 124, 98 S.Ct. at 2659. Both the nature of the property right and of the governmental invasion must be considered.

Unlike contract claims, the tort claims asserted here lack "investment-backed expectations." *Penn Central*, 438 at 124, 98 S.Ct. at 2659. *Cf. Lynch v. United States*, 292 U.S. 571, 579, 54 S.Ct. 840, 843, 78 L.Ed. 1434 (1934). Not only are they contingent by their nature, but they also arise in a field in which the law remains to be developed. *See, e.g., Molsbergen v. United States*, 757 F.2d 1016, 1020-25 (9th Cir.1985).

The governmental action, moreover, does not abrogate the claims but subjects them to the tort claims procedure which the plaintiffs could reasonably expect might be applied. This is true, notwithstanding the naming of contractors as defendants, because the claims arose out of activities conducted by the government and the contractors were named for the obvious purpose of escaping the well-known limits on the government's waiver of sovereign immunity. For these reasons, the Court concludes that plaintiffs do not have a taking claim.[11]

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11. It appears that § 2212, in providing that an action under the FTCA "shall be exclusive of any other civil action or proceeding for the purpose of determining civil liability arising from any act or omission," would in any event preclude litigation of plaintiffs' claims in the Claims Court to ascertain their value for compensation purposes.

2. *The Separation of Powers Issue*

Congressional attempts to alter the rule of decision in pending cases in favor of the government have been condemned as a violation of Article III. *See United States v. Klein*, 80 U.S. (13 Wall.) 128, 146-47, 20 L.Ed. 519 (1871); *United States v. Sioux Nation of Indians*, 448 U.S. 371, 404, 100 S.Ct. 2716, 2735, 65 L.Ed.2d 844 (1980). The instant cases, however, do not fall within that prohibition. Section 2212 does not withdraw jurisdiction from the federal courts, does not deprive a party of the benefit of a judgment, and does not mandate the outcome of particular cases. It substitutes remedies but it leaves the application of the rules of law, including any defenses, for judicial determination. *See Dames & Moore v. Regan*, 453 U.S. 654, 685, 101 S.Ct. 2972, 2989, 69 L.Ed.2d 918 (1981).

> [T]he better reading of *Klein* is quite narrow and construes the case as holding only that Congress violates the separation of powers when it presumes to dictate "how the Court should decide an issue of fact (under threat of loss of jurisdiction)" and purports to "bind the Court to decide a case in accordance with a rule of law independently unconstitutional on other grounds."

United States v. Brainer, 691 F.2d 691, 695 (4th Cir.1982) (quoting P. Bator, D. Shapiro, P. Mishkin & H. Wechsler, *Hart & Wechsler's The Federal Courts and the Federal System* 316 n. 4 (2d ed. 1973)). Since the Act neither directs the courts to make a certain finding of fact nor requires them to apply an unconstitutional law, the separation of powers doctrine is not offended. *See also Battaglia*, 169 F.2d at 262.

Section 2212 is therefore a valid exercise of Congressional power. The United States must be substituted as the defendant in place of the contractors, and the contractors dismissed from these actions.

III. *The Government's Motion to Dismiss or For Summary Judgment*

Under § 2212, these actions must be treated as having been brought against the United States under the FTCA. The FTCA is a limited waiver of sovereign immunity subject to certain statutory and judicial exceptions. The government has moved to dismiss or for summary judgment on the ground that each plaintiff's claims are barred by one or more of those exceptions.

A. *The Discretionary Function Exception*

The FTCA excludes any claim "based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused." 28 U.S.C. § 2680(a). The government raises the discretionary function exception as a defense to all claims raised by all plaintiffs.

1. *Claims arising out of acts or omissions in connection with the detonation of nuclear weapons*

Plaintiffs' first category of claims is based on injuries caused by their exposure to radiation from nuclear weapons. They may be summed up as resting on alleged negligent failures to take adequate safety precautions at the test sites.

Plaintiffs acknowledge that the decision to conduct the tests is covered by the discretionary function. They contend, however, that the Court must examine each challenged act or omission to determine whether, in the light of the policies underlying the exception, it is of the type that Congress intended to protect. According to plaintiffs, many of those acts involved only the exercise of what they refer to as "scientific or professional judgment" in implementing an overall decision to conduct the atomic weapons testing program and hence are not covered by § 2680 (a). *See e.g., Driscoll v. United States*, 525 F.2d 136 (9th Cir.1975). In addition, they argue that the government can be held liable for failing to enforce its own safety requirements.

The fountainhead of jurisprudence relating to the discretionary function exception is *Dalehite v. United States*, 346 U.S. 15, 73 S.Ct. 956, 97 L.Ed. 1427 (1953). The continuing vitality of that decision was recently affirmed in *United States v. S.A. Empresa de Viacao Aerea Rio Grandense* ("*Varig*"), — U.S. —, 104 S.Ct. 2755, 81 L.Ed. 2d 660 (1984). *Dalehite* involved claims for damages against the United States arising out of a disastrous explosion of ammonium nitrate fertilizer, which had been produced and distributed under the direction of the United States for export to areas occupied by the Allied Armed Forces after World War II. Numerous acts of the government were charged as negligent: the cabinet-level decision to institute the fertilizer export program, the failure to experiment with the fertilizer to determine the possibility of explosion, the drafting of the basic plan of manufacture, and the failure properly to police the storage and loading of the fertilizer.

The Supreme Court concluded that these allegedly negligent acts were governmental duties protected by the discretionary function exception and held the actions barred by § 2680(a). Describing the discretion protected by § 2680(a) as "the discretion of the executive or the administrator to act according to one's judgment of the best course," 346 U.S. at 34, 73 S.Ct. at 967, the Supreme Court stated:

> It is unnecessary to define, apart from this case, precisely where discretion ends. It is enough to hold, as we do, that the "discretionary function or duty" that cannot form a basis for suit under the Tort Claims Act includes more than the initiation of programs and activities. It also includes determinations made by executives or administrators in establishing plans, specifications or schedules of operations. Where there is room for policy judgment and decision there is discretion. It necessarily follows that acts of subordinates in carrying out the operations of government in accordance with official directions cannot be actionable.

Id. at 35-36, 73 S.Ct. at 967-68 (footnotes omitted). In the course of its opinion, the Supreme Court analyzed the legislative history of the FTCA. It noted that "congressional thought was centered on granting relief for the run-of-the mine accidents, as distinguished from injury from performing discretionary governmental functions," *id.* at 28, n. 19, 73 S.Ct. at 964, n. 19, and concluded that in § 2680 "Congress exercised care to protect the Government from claims, however negligently caused, that af-

fected the governmental functions." *Id.* at 32, 73 S.Ct. at 966.[12]

Dalehite is squarely on point. The argument made by plaintiffs in that case, and rejected by the Supreme Court, was essentially the same as that made here, i.e. that the charges were directed not at

> "any Cabinet decision . . . [but] only to the mistakes of judgment and the careless oversight of Government employees who were carrying out a program of manufacturing and shipping fertilizer and who failed to concern themselves as a reasonable man should with the safety of others."

Id. at 35, 73 S.Ct. at 967 (quoting petitioners' arguments).

The specific acts of negligence charged were the temperature at which the fertilizer was bagged, the coating and bagging materials used, and the labelling of the bags. *Id.* at 39, 46-57, 73 S.Ct. at 969, 973-79. The Supreme Court found all of these acts covered by the discretionary function exception because they were "performed under the direction of a plan developed at a high level under a direct delegation of plan-making authority from the apex of the Executive Department." *Id.* at 40, 73 S.Ct. at 970.

The case presented by plaintiffs is congruent with *Dalehite*. Plaintiffs chose to focus their arguments on the

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12. The Supreme Court added: "So we know that the draftsmen did not intend it to relieve the Government from liability for such common-law torts as automobile collision caused by the negligence of an employee. . . ." 346 U.S. at 34, 73 S.Ct. at 967.

conduct of Operation Crossroads.[13] There, too, a detailed and extensive Operation Plan was adopted on orders from the highest levels of the Executive Department.[14] An integral part of that Plan was an extensive Safety Plan which, according to plaintiffs, at first lacked but later contained a plan for decontamination.[15] The Safety Plan described anticipated radiation hazards, established exposure limits, and assigned responsibility for protecting personnel against exposure to unknown hazards.[16]

Plaintiffs' contention is that the government's scientists who prepared the plan "failed to appreciate or prepare for the magnitude of the hazards that would result." Plaintiffs' Statement of Facts at 16. They argue that "AEC and military officials were responsible for developing safety plans to carry out Presidential and cabinet and agency-level directives to conduct the planned detonations without unduly jeopardizing the safety of the participants;

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13. Plaintiffs' Op.Br. at 3. That operation, according to plaintiffs, epitomizes the nuclear weapons testing program at its worst: "In hindsight Operation Crossroads was an extraordinary fiasco, America's first nuclear disaster. The Joint Task Force took a radiation bath without adequate resources to deal with the decontamination problems that ensued." *Id.* at 76.

14. Government Exhibits E-7.10-7.15. Operation Plans for subsequent tests may be found at Government Exhibits E-8 (Operation Buster-Jangle), E-9 (Operation Castle), E-10 (Operation Redwing), E-11 (Operation Hardtack), E-12 (Operation Ivy), and E-13 (Operation Dominic I).

15. Government Exhibits E-7.3 to E-7.7. Extensive Safety Plans were a part of the Operation Plan for each test. *See, e.g.*, Operation Plan for Operation Castle, Government Exhibit E-9, at N-I to N-III-2.

16. Plaintiffs' Statement of Facts, at 11-16.

for ensuring that all participants except those performing unusual or high priority missions such as cloud sampling were not subjected to radiation doses exceeding the exposure limits established by the plan; and for following other safety guidelines established in the plan, such as decontamination measures and use of protective clothing and gear. . . . There is substantial evidence that their negligent failure to carry out these operational tasks resulted in the overexposure of many hundreds or thousands of test participants, including the safety monitors themselves." Plaintiffs. Op. Br. at 30.

The nuclear weapons tests on which these actions are founded were carried out pursuant to specific legislative authority in the 1946 Atomic Energy Act, and its successor, the 1954 Atomic Energy Act, 42 U.S.C. § 2011 *et seq.*, and presidential order.[17] They were conducted for the purpose of developing and testing weapons and discovering their effects, an inherently dangerous undertaking. The Safety Plan developed for each test series was designed to minimize exposure to radiation consistent with the purposes of the tests. The Plan provided that "[r]adiological safety of all military and civilian personnel is a command responsibility."[18] While the Plan established radiation exposure limits, it was subject to the authority of the officer in charge of any particular test, who could permit exposure in excess of the established level if the exigencies of the situation required. Thus the Plans speci-

17. See Government Exhibits E-14 to E-26.4.

18. Government Exhibit I-4, at 1. *See also* Government Exhibits J-5, at 3; I-1, at 3; E-11, at K-T; J-3 at 1.

fied that compliance with exposure limits was conditioned upon operational requirements:

> Due to the special nature of field tests it is considered that a policy of strict adherence to the radiological standards prescribed for routine work is not realistic. The regulations set forth herein have been designed as a reasonable and safe compromise considering conservation of personnel exposures, the international import of the test and the cost aspects of operational delays chargeable to excessive radiological precautions. In all cases other than emergencies or tactical situations, the ultimate criteria will be limited by the MPEs [maximum permissible exposure] for personnel. Special instances may arise . . . in which operations will be carried out without regard to the MPEs and MPLs [maximum permissible level] prescribed herein. For such emergency or tactical operations the criteria prescribed below for tactical situations will be used as a guide.[19]

The Safety Plan incorporated into the Operation Plan contemplated that judgments and decisions concerning exposure to radiological hazards and the degree of protection to be afforded would be made in the light of the objectives and the needs of the test program. Safety decisions, therefore, were a part of the policy decisions made in the conduct of the weapons tests,[20] and they fall squarely within the articulation in *Dalehite* that

> [w]here there is room for policy judgment and decision there is discretion.

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19. Joint Task Force Seven, Command Task Group 7.3, *Operation Plan*, December 7, 1953, Government Exhibit J-21, at G-1-1. *See generally* references cited in Government Memo. in Support of Summary Judgment (Discretionary Function) at 772-777.

20. *See also* the discussion at pp. 762-63, *supra*.

346 U.S. at 36, 73 S.Ct. at 968. That those judgments and decisions may have been made by scientists or other operational personnel does not affect the application of the discretionary function exception. As stated by the Court in *Varig,* "it is the nature of the conduct, rather than the status of the actor, that governs whether the discretionary function exception applies. . . ." 104 S.Ct. at 2765.

Even under the pre-*Varig* decisions of the Ninth Circuit, the result is the same. The court has used three criteria to determine whether to apply the discretionary function exception: (1) whether the decision was made at the planning level or the operational level;[21] (2) whether the judiciary is in a position to evaluate the act or omission; and (3) whether judicial evaluation would impair the effective administration of the government. *Nevin v. United States,* 696 F.2d 1229, 1230 (9th Cir.), *cert. denied,* — U.S. —, 104 S.Ct. 70, 78 L.Ed.2d 84 (1983). Applying those criteria to these actions, decisions concerning safety were in the first instance made by those charged with the preparation of the Operation Plan and its components. The responsibility for carrying out the Safety Plan was assigned to the officials in charge of the tests who had discretion to adopt and modify the Plan as necessary to achieve the objectives of the test. A court would be ill-equipped to evaluate the judgments concerning safety made by those officials based on the exigencies of the moment. Any attempt to do so would, moreover, require a

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21. The continuing vitality of this criterion is in doubt in view of the Supreme Court's statement in *Varig* that "it is the nature of the conduct, rather than the status of the actor, that governs whether the discretionary function applies. . . ." 104 S.Ct. at 2765.

comprehensive reexamination of the conduct of the tests and the decisions made during their course which would itself defeat the purpose of the exception. The consequences of such a reexamination would be to hamper the government in its future conduct of weapons tests and similar operations affecting the national security.[22]

Accordingly, plaintiffs' claims based on failures to take adequate safety precautions at tests must be dismissed.[23]

2. *Claims Based on the Government's Failure to Issue Warnings Prior to 1977*

Plaintiffs' second category of claims is based on the breach of the government's alleged duty to warn plaintiffs of the dangers to which they had been exposed or to monitor test participants for health problems resulting from radiation exposure. The Ninth Circuit has postulated that California courts would impose a duty on the government to warn test participants of the dangers to which they have been exposed. *See Molsbergen v. United States*, 757 F.2d 1016, 1020-25 (9th Cir.1985). Such a duty would exist when a test participant could show that (1) the government has information relating to a serious risk to the life,

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22. The appropriateness of deciding issues of governmental immunity on summary judgment to avoid unnecessary inquiries disruptive of effective government was stressed by the Supreme Court in *Harlow v. Fitzgerald*, 457 U.S. 800, 816-17, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982).

23. Although plaintiffs do not assert claims arising out of nondiscretionary acts or omissions at the test sites (such as an automobile accident), such claims would also be barred by the *Feres* doctrine and in some cases the foreign country exception. *See infra* at pp. 776-79.

safety or health of a participant; (2) the conduct of the government gave rise to the risk; (3) the burden resulting from imposition of a duty to warn is not onerous; and (4) there is reason to believe that a warning would have some practical effect. *Id.* For purposes of this ruling, it is assumed that the government failed to provide plaintiffs with any warning of the health risks of exposure to radiation until 1977.

The government's motion is not directed at whether it had a duty to warn. Rather, the government argues that in these cases the government's failure to warn involved the failure to perform a discretionary function and that the claims are therefore barred.

Assuming the government had a duty to warn, the threshold question in determining whether the discretionary function applies is what, if any, warning measures it was obliged to undertake on behalf of test participants prior to 1977. This is not a case of failing to warn river users of a hidden obstruction beneath the surface, *Lindgren v. United States,* 665 F.2d 978 (9th Cir.1982); or park users of the risk of flash floods, *Ducey v. United States,* 713 F.2d 504 (9th Cir.1983); or a treating physician of his patient's dangerous propensities. *Jablonski v. United States,* 712 F.2d 391 (9th Cir.1983). The kind of "warning" that these cases involve is best illustrated by the program the government did undertake beginning in 1977 on the strength of findings by the Centers for Disease Control of a leukemia cluster among test participants. At that time the Defense Nuclear Agency established the Nuclear Test Personnel Review ("NTPR") program. It began to assemble and publish voluminous

materials concerning radiation exposure during tests and to calculate levels of exposure of personnel. Beginning in 1979, test participants whose records indicated significant radiation exposure were notified and provided with medical examinations. The notification and examination program was gradually expanded to include personnel who had received lower doses. It was also extended to the Department of Health, Education and Welfare which began to conduct studies and a public information program.[24]

The decision to embark on this program entailed a commitment of substantial resources, including the assignment of a large number of employees and the expenditure of large sums of money. The initial cost of the NTPR alone was $6,000,000 per year. The program required difficult judgments balancing the magnitude of the risk from radiation exposure—of which there was only fragmentary knowledge—against the risks and burdens of a public program. Those risks included the potential consequences of creating public anxiety and the health hazards inherent in the medical responses to the warning.[25]

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24. *See* the discussion and references cited at Government Memo. in Support of Summary Judgment (Discretionary Function) at 45-51; Government Reply Memo at 774-77.

25. *See* E. Robin, *Matters of Life & Death: Risks v. Benefits of Medical Care* (1984), which discusses the health hazards inhering in any wide-spread campaign to warn against and detect disease. Diagnostic tests, by reason of the intrusive procedures used, false positive indications, and sometimes unwarranted psychological effects, produce their own adverse consequences which must be taken into account.

(Continued on next page)

Thus any decision whether to issue warnings to thousands of test participants of possibly life-threatening dangers and to provide them with appropriate examinations and counseling calls for the exercise of judgment and discretion at high levels of government. The difficulty of such decisions is illustrated simply by the problem of how to phrase such a warning where the degree of exposure of any particular participant and the consequent risk is not known.[26] A decision must also take into account sensitive questions concerning its impact on on-going and future tests and on the military and civilian participants.[27]

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The experience under the government's 1976 Swine Flu Program illustrates the hazards of a hasty reaction to a health problem, the dimensions and seriousness of which are not yet known at the time. Although the probability of an epidemic was never established, the public was strongly urged to submit to immunization with little advice respecting its attendant hazards. R. Neustadt, *Swine Flu Affair: Decision-Making on a Slippery Disease* 86-97 (1978); Gray, "Complexities of Informed Consent," 437 *Annals Am. Academy Pol. & Soc. Sci.* 37, 44 (May, 1978); Centers for Disease Control, *Public Attitudes Toward the Swine Flu Immunization Program and Medical Coverage of Events 2-7* (1981). The government's experience with the swine flu program highlights the policy and cost/benefit tradeoffs involved in large-scale public responses to perceived health problems.

26. Not the least of the problems the government would face is that once having undertaken to issue a "warning", it may come under an obligation to exercise due care toward members of the public relying on it. *See Indian Towing Co. v. United States*, 350 U.S. 61, 69, 76 S.Ct. 122, 126, 100 L.Ed. 48 (1955) (not decided under the discretionary function exception).

27. Studying the psychological reactions of troops to nuclear weapons during field tests was a specific goal of many of the

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In no sense can such a decision be equated with decisions to warn of submerged obstructions to navigation or flash floods.[28] Courts cannot be considered qualified to evaluate such a decision and any attempt to do so is likely to interfere with important governmental activities. Formulating and issuing warnings requires the government "to establish priorities for the accomplishment of its policy objectives by balancing the objectives sought to be obtained against such practical considerations as staffing and funding." *Varig*, 104 S.Ct. at 2768. The conclusion is inescapable that every aspect of a warning program is a matter that falls within the discretionary function exception as defined in *Dalehite* and *Varig:*

> Where there is policy judgment and decision there is discretion.

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tests. *See, e.g.*, Characteristics of Troops with Varying Levels of Information about Atomic Effects, Government Exhibit D-67; Memorandum for the AEC Chairman, July 16, 1951, Government Exhibit K-14. To carry out such studies and achieve test objectives, the government needed complete control over information supplied to the troops. Troops were to be indoctrinated on how to conduct themselves on the nuclear battlefield. As one officer explained, the goal was to teach soldiers to respect radioactivity, not to fear it. Capt. Frank Winant, Command Problems of Atomic Defensive Warfare, Sept. 1947, Government Exhibit J-13.

28. *See, Begay v. United States*, 768 F.2d 1059 (9th Cir.1985); *First Nat'l Bank in Albuquerque v. United States*, 552 F.2d 370, 374-77 (10th Cir.), *cert. denied*, 434 U.S. 835, 98 S.Ct. 122, 54 L.Ed.2d 96 (1977) (decision by Department of Agriculture whether label on fungicide complied with statutory requirement that it contain a warning "necessary and if complied with adequate to prevent injury" fell within discretionary function exception).

346 U.S. at 36, 73 S.Ct. at 968. The decisions of the Ninth Circuit, discussed in the immediately preceding section, compel the same result.

Plaintiffs argue that the discretionary function exception cannot apply in the absence of a "conscious decision."[29] The statute is not so limited; it exempts "[a]ny claim based upon . . . the failure to exercise or perform a discretionary function . . ." 28 U.S.C. § 2680(a) The language is directed at the nature of the conduct, and does not require an analysis of the decision-making process. *Cf. General Public Utilities Corp. v. United States*, 745 F.2d 239, 245 (3d Cir.1984), *cert. denied*, — U.S. —, 105 S.Ct. 1227, 84 L.Ed.2d 365 (1985) (the exemption is based on the nature of the conduct, "not whether there is an option to choose"). When enacting § 2680, "Congress exercised care to protect the Government from claims, *however negligently caused*, that affected the governmental functions." *Dalehite*, 346 U.S. at 32, 73 S.Ct. at 966 (emphasis added).

If the decision to issue or not to issue a "warning" is within the discretionary function exception, then logically the failure to consider whether to issue one necessarily falls within the exception as well. Any other interpretation of the statute would create insurmountable problems in its administration: What would constitute a "decision"? Would a decision to defer decision be a "decision"? Would the government be subject to liability for failing to act where operational employees conducting the

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29. *See Allen v. United States*, 588 F.Supp. 247, 337-40 (D. Utah 1984).

relevant research consider the evidence as yet insufficient for making a decision? As the Supreme Court said in *Varig*, one must look to "the nature of the conduct" to determine whether the exception applies. In this case, the relevant conduct is the issuance of "warnings," not the decision-making process or the failure to make a conscious, explicit decision.

Accordingly, plaintiffs' claims based on the failure to issue warnings must also be dismissed.

B. *The Feres Doctrine*

The government argues that claims on behalf of servicemen are also barred by the exception created in *Feres v. United States*, 340 U.S. 135, 71 S.Ct. 153, 95 L.Ed. 152 (1950). That case held that the FTCA does not to extend to "injuries to servicemen where the injuries arise out of or are in the course of activity incident to service." *Id.* at 146, 71 S.Ct. at 159. *Feres* thus bars claims resulting from radiation exposure allegedly sustained while in the military service, and those claims must accordingly be dismissed.

Feres does not, however, bar claims arising out of an independent tort committed by the government subsequent to a serviceman's discharge. *Brown v. United States*, 348 U.S. 110, 75 S.Ct. 141, 99 L.Ed. 139 (1954). In *Broudy v. United States*, 661 F.2d 125 (9th Cir.1981), the Ninth Circuit considered this limitation on *Feres* in the context of a claim for injury to a serviceman arising out of exposure to radiation from atmospheric nuclear weapons tests. Plaintiff alleged that the government should be held liable for violation of a continuing duty to the serviceman to

warn, monitor and treat him after discharge. The court rejected the continuing tort argument and held that to be cognizable under the FTCA, the claim must be based on an

> independent, post-service negligent act on the part of the Government. . . . The Government's failure to warn Major Broudy of and monitor any possible injuries arising from his exposure to radiation might constitute such an act if the Government learned of the danger after Major Broudy left the service.

661 F.2d at 128-29.[30]

Unlike *Broudy* and *Molsbergen*, these cases are before the Court, not on the pleadings, but on the record made on defendant's motion for summary judgment. The undisputed facts before the Court show that test officials knew and understood throughout the periods in question that exposure to nuclear radiation created a health hazard. By the early 1940's a large body of literature existed on the subject.[31] The literature included studies documenting radiation poisoning of workers painting watch dials with radium to make them glow in the dark, and linked exposure to radium radiation to an increased risk of cancer.[32]

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30. More recently the issue came before the Ninth Circuit again in *Molsbergen v. United States*, 757 F.2d 1016 (9th Cir. 1985), discussed *supra* at pp. 774-77.

31. *See Allen v. United States*, 588 F.Supp. 247, 358-70 (D.Utah 1984); Warren, "The Role of Radiology in the Development of the Atomic Bomb," at 920-21 in K. Allen, *Radiology in World War II* (1966) (bibliography of pre-1945 scientific literature on biological effects of radiation), Government Exhibit I-15.

32. *See* Plaintiffs' Exhibits 41-42.

In August, 1946, the government knew that radiation emitted by the test explosions was "the most toxic chemical yet known," with a microscopic amount constituting a lethal dose to man.[33] By September, 1946, the Manhattan Engineer District Medical Advisory Committee recognized that radiation could cause genetic effects, histopathological changes, physiological changes, and biological and enzymatic disturbances.[34]

Shortly after the tests at Operation Crossroads were conducted, Colonel Warren, the officer in charge of radiation safety at those tests, delivered an address on the effects of radiation in which he observed:

> Later when the decay reduced the gamma radiation to safe levels you would be subject to dangerous hazards in [the test area]. This would not be lethal in the sense of being immediately dangerous. There is a potential and actual absorption hazard. You need only to absorb a few micrograms of plutonium and other long-life fission materials, and then know that you are going to develop a progressive anemia or a tumor in from 5 to 15 years. This is an insidious hazard and an insidious lethal effect hard to guard against.[35]

Colonel Warren also knew by that time that exposure to radiation could cause cancer:

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33. Memorandum from Colonel Warren to Commander Task Group 1.2, at 1 (August 13, 1946), Plaintiffs' Exhibit 36.

34. See Recommendation of the Manhattan Engineer District Medical Advisory Committee, September 5-6, 1946, at 2-2, Government Exhibit J-9.

35. Transcript of Lecture by Colonel Warren, October 7, 1946, at 21-22, Government Exhibit J-10.

> [E]xtremely small amounts [of beta and gamma emitters] deposited in the marrow will eventually cause progressive anemia and death years later. Tumor formation has a high incidence. This is true in higher doses for most radioactive metals and can be predicted by any shrewd knowledgable [sic] layman.[36]

He recommended that certain medical information be declassified and civilian groups be told that the radiation effects from the explosion of a nuclear bomb are

> much like the problem of radium dial painters. The amount necessary to cause this hazard is minute—measured in millionths of a gram. The harmful effects occur years later.[37]

These contemporaneous acknowledgments of the hazardous effects of radiation show that the government was aware at all relevant times that radiation exposure had the potential for causing a variety of serious health problems, including the injuries claimed by plaintiffs.

The evidence also shows that scientific understanding of the health effects of radiation exposure advanced after detonation of the first atomic bomb in 1945. In the years following Operation Crossroads, studies of the health risks from radiation exposure continued. In 1952 studies by government contractors indicated an elevated incidence of leukemia among persons exposed to the explosions at Hiroshima and Nagasaki.[38] In 1957 reports based on studies of survivors of those bombings indicated that there may be

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36. Memorandum to Major General Groves from Colonel Warren, October 9, 1946, at 1, Government Exhibit J-11.

37. *Id.* at 2.

38. *See* Plaintiffs' Exhibits 43, 45.

no safe doses of radiation below which no risk of leukemia, lung cancer and genetic damage exists.[39]

The permissible radiation exposure limitations, however, were changed only marginally during this period. In 1945, at the time of the Manhattan Project, the recommended exposure limitation was set at 0.1 roentgen (R) per day. In 1949 the AEC had adopted 0.3 R per week as the base level guideline for test participants, with a maximum permissible exposure level of 3.9 R during any consecutive 13-week period. In 1956 international and national guidelines for occupational exposure to radiation were set at 5 R per year, and that standard has since remained essentially unchanged.

This evidence establishes beyond dispute that throughout the period involved, the government had knowledge, albeit incomplete, of the nature and degree of the danger to test participants. As another court has noted, while "hard experimental evidence of somatic effects, especially cancer and leukemia, of exposure below the permissible limits of 0.3 R per week was largely lacking, [by 1950] potential risk was not ignored [by government officials]." *Allen v. United States,* 588 F.Supp. 247, 360 (D.Utah 1984).

Plaintiffs' case is premised on "the existence of a cognizable duty to warn former servicemen of hazards to which they were exposed during their military service. . . ." Plaintiffs' Op.Br. at 91. They do not dispute that the government had knowledge of the risks of radiation exposure when plaintiffs were exposed but they argue that

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39. See Plaintiffs' Exhibits 46-59.

"its knowledge subsequently *expanded* to such a point that a new duty to warn of the danger arose." *Id.* at 92 (emphasis in original).

No facts are put forward by plaintiffs which would permit a trier of fact to find the commission of an "independent post-service negligent act." According to plaintiffs' own evidence, the government knew since at least 1946, prior to any of the tests and within a year of Hiroshima, that servicemen at test sites would be exposed to potentially lethal doses of radiation. Had there been a duty to warn servicemen of a dangerous condition, that information clearly was sufficient to trigger it. The facts show that the government's knowledge continued to increase over the years following 1946. Evidence accumulated of the relationship of radiation exposure to disease. The increases in knowledge were, however, quantitative, not qualitative, providing confirmation of risks that had been presumed but not proved to exist. The record reflects no act or omission following the discharge of any plaintiff or decedent from which the commission of an independent, post-discharge tort could be found. It precludes the existence of such proof, moreover, in view of the undisputed knowledge of the government at all relevant times that it had exposed test participants to life-threatening risks during the tests.[40] Accordingly, even apart from the discretionary function exception, defendant is entitled to summary judgment on all claims asserted by or on behalf of servicemen. *See Heilman v. United States*,

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40. Plaintiffs have requested further discovery but have not demonstrated how further discovery might establish commission of a post-discharge tort. That request is therefore denied.

731 F.2d 1104 (3rd Cir.1984); *Gaspard v. United States*, 713 F.2d 1097 (5th Cir.1983), *cert. denied*, — U.S. —, 104 S.Ct. 2354, 80 L.Ed.2d 826 (1984); *Lombard v. United States*, 690 F.2d 215 (D.C.Cir.1982), *cert. denied*, 462 U.S. 1118, 103 S.Ct. 3086, 77 L.Ed.2d 1347 (1983); *Laswell v. Brown*, 683 F.2d 261 (8th Cir.1982), *cert. denied*, 459 U.S. 1210, 103 S.Ct. 1205, 75 L.Ed.2d 446 (1983).

C. *Foreign Country Exception*

The FTCA excludes from coverage "[a]ny claim arising in a foreign country." 28 U.S.C. § 2680(k). To the extent plaintiffs seek to recover on the basis of negligent acts or omissions which occurred in a foreign country, their claims are barred. *United States v. Spelar*, 338 U.S. 217, 70 S.Ct. 10, 94 L.Ed. 3 (1949).

Plaintiffs' argument in opposition to the motion for summary judgment is susceptible to the interpretation that liability is sought to be imposed for a negligent failure to carry out adequate safety procedures to prevent radiation exposure. *See* Plaintiffs' Op. Br. at 30-33. Claims resting on negligent acts or omissions in Japan,[41] the Marshall Islands[42] or at Christmas Island [43] are therefore barred.

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41. *Molsbergen v. United States; Minarik v. United States; Solano v. United States.*

42. *Beaman, Benson, Carsillo, Collins, Cordray, DeMuth, Erspamer, Estes, Ferguson, Guarisco, Milne, Paskett, Saraiva, and Van Winkle v. United States.* The Marshall Islands are considered to be a foreign country. *Callas v. United States*, 253 F.2d 838, 840 (2d Cir.), *cert. denied*, 357 U.S. 936, 78 S.Ct. 1384, 2 L.Ed.2d 1550 (1958).

43. *Harrison v. United States.*

D. *The Combatant Activities Exception*

The FTCA excludes from its coverage "[a]ny claim arising out of the combatant activities of the military or naval forces . . . during time of war." 28 U.S.C. § 2680(j). The Molsbergen, Minarik and Solano complaints allege that plaintiffs' decedents were exposed to radiation during World War II while conducting military operations in Japan at the time of the nuclear explosion there. To the extent the claims are based on injuries incurred at that time, they must be dismissed. *Miller v. United States,* 643 F.2d 481, 486 (8th Cir.1980).

CONCLUSION

For the reasons stated, the following order is hereby entered:

A. With respect to the *Ryder* action (83-5642), that action is severed for further proceedings consistent with this memorandum of opinion and order.[44]

B. With respect to all of the remaining actions listed in notes 1-2 *supra*:

1. The United States will be substituted as the defendant in place of the contractors.

2. The contractors will be dismissed from the actions.

3. The actions will be dismissed under the discretionary function exception.

4. In addition the claims brought by or on behalf of servicemen and those portions of claims brought on

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44. See note 4 *supra*.

behalf of Smith that occurred while Smith was a member of the military will be dismissed on the alternative ground of the *Feres* doctrine.[45]

5. In addition the claims brought by Molsbergen, Minarik and Solano based on exposure to radiation during military exercises will be dismissed on the alternative ground of the combatant activities exception.

6. In addition the claims in the Molsbergen, Minarik, Solano, Beaman, Benson, Carsillo, Collins, Cordray, DeMuth, Erspamer, Estes, Ferguson, Guarisco, Milne, Paskett, Saraiva, Van Winkle, Williams, Blake, Porambo, Dixon, Fassett, Harrison, Green, Stephens, King, and Hinkle actions based on government conduct that occurred at Hiroshima, Nagasaki, the Marshall Islands, or Christmas Island will be dismissed on the alternative ground of the foreign country exception.

7. The state law claims for medical malpractice in the Hinkle action (85-2138), are remanded to state court, and counsel are directed to submit an appropriate form of order.

IT IS SO ORDERED.

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45. See note 1 *supra*.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

ALICE P. BROUDY, Plaintiff,	CV No. 79-2626-LEW
v.	MEMORANDUM OF DECISION AND ORDER
UNITED STATES OF AMERICA, et al., Defendants.	(Filed Dec. 17, 1985)

This wrongful death action was filed in 1979. It has made two trips to the Ninth Circuit since that time, both trips following the granting by this Court of a defense motion to dismiss. Now the case is before the Court on its third dispositive motion, the government's motion for summary judgment. That motion came on for hearing before this Court on November 25, 1985 and the Court orally granted the motion. What follows is a more complete discussion of the basis for that ruling.

Plaintiff Alice P. Broudy filed this action against the government under the Federal Tort Claims Act, 28 U.S.C. §§ 1346, 2671 *et seq.* She is seeking damages for the death of her husband, Major Charles A. Broudy, a retired United States Marines Officer. The complaint alleges Major Broudy died of cancer, lymphosarcoma, caused by exposure to radiation. This exposure occurred while Major Broudy was serving in the United States Marine Corps.

The Ninth Circuit has held that under the *Feres* doctrine, *Feres v. United States*, 340 U.S. 135 (1950), plain-

tiff is barred from recovering for the alleged wrongful death of her husband to the extent it may have been due to in-service negligence. *Broudy v. United States,* 661 F.2d 125 (9th Cir. 1981) [*Broudy* I]. However, the Circuit left open the possibility of recovery by plaintiff in this case if she could show that her husband's death was due to "independent post-service negligence." *Broudy v. United States,* 722 F.2d 566, 570 (9th Cir. 1983) [*Broudy II*]. The court further held that although plaintiff's administrative claim to the Department of Energy alleged only exposure to radiation as the cause of death, the claim could be construed to cover in addition a suit against the government for post-service failure to warn of the dangers of decedent's exposure to radiation.

The government moves for summary judgment on the basis of the *Feres* doctrine and the discretionary function doctrine. In opposition the plaintiff makes essentially one argument: that this is now really a claim for failure by the doctors at El Toro Medical Facility to warn the decedent of the dangers of radiation exposure when he went to the facility for post-service treatment. This Court concludes that to the extent plaintiff is now arguing a malpractice claim against the government for the acts of the doctors and hospital, that claim is barred. First, plaintiff's administrative claim does not stretch far enough to include a claim for post-service malpractice. Second, even if the claim did encompass such an action, it was not filed with the proper agency.

In addition to this malpractice argument, plaintiff also argues post-service failure to warn as a basis for recovery. As to this claim, the Court concludes that it is barred by

the discretionary function doctrine. Even in the absence of this doctrine, it appears that plaintiff would be barred by the fact the government knew of the dangers of radiation exposure to the decedent during the time he was in the service. *See, In re Consolidated United States Atmospheric Testing Litigation*, 616 F.Supp. 759 (N.D.Cal. 1985).

A. *Discretionary Function Doctrine.*

The government raises in this motion the issue of application of the discretionary function doctrine. Specifically, the government argues that plaintiff's post-service failure to warn claim is barred because any such warning would be the "exercise or performance or the failure to exercise or perform a discretionary function or duty . . . " 28 U.S.C. § 2680(a). This provision, when it applies, divests this Court of jurisdiction to consider the claim. Contrary to plaintiff's suggestion, the application of the discretionary function doctrine is an issue of subject matter jurisdiction, and therefore has not been waived by the government. *Grunnet v. United States*, 730 F.2d 573, 575 (9th Cir. 1984) ("[w]here an alleged tort falls within one of the statutory exceptions, a District Court will lack subject matter jurisdiction to hear a suit arising from the alleged tort.").

Judge Schwarzer was presented with the application of the discretionary function doctrine in the failure to warn context in *In re Consolidated United States Atmospheric Testing Litigation*, 616 F.Supp. 759 (N.D.Cal. 1985) [hereinafter cited as *Atmospheric Testing*]. He analyzed the law and concluded that the doctrine applied

in a failure to warn case similar to the one before this Court. Having reviewed that opinion and the authority cited therein, this Court hereby adopts the reasoning in the *Atmospheric Testing* case, and in accordance therewith holds that this Court lacks subject matter jurisdiction over plaintiff's post-service negligent failure to warn claim.

B. *Medical Malpractice.*

Plaintiff's opposition to the government's motion for summary judgment is sprinkled with suggestions that the real complaint is against the doctors at El Toro who, when decedent came in for treatment after his retirement, failed to warn him of the dangers of radiation exposure. Plaintiff is barred at this time from bringing such a suit.

1. *Claim.*

In order to maintain a suit under the Federal Tort Claims Act, a plaintiff must submit a claim to the appropriate federal agency. *Broudy II*, 722 F.2d at 568. The claim in this case was submitted to the Department of Energy and stated that "Charles A. Broudy was exposed to radiation in the Pacific Ocean and Nevada, by being in the vicinity of nuclear detonation on the above dates." The incident alleged is exposure to radiation. The Circuit in *Broudy II* held that this claim could serve as the basis for a post-service failure to warn suit in addition to serving as the basis for the original in-service negligent exposure action. However, this Court seriously doubts whether the Circuit would construe this holding to allow plaintiff to proceed on a malpractice claim against the government.

The case of *Provancial v. United States*, 454 F.2d 72 (8th Cir. 1972) is particularly instructive. The court in

Provancial was presented with a fact situation very similar to the one at bar. The plaintiff in *Provancial* filed a claim with the Department of Justice which identified arrest and detention as the incident causing the wrongful injury. The plaintiff later tried to bring suit against the hospital which treated him after he received the injuries. The court held that the two claims, one for negligent police officer conduct and the other for medical malpractice were "obviously distinct and different . . ." *Provancial,* 454 F.2d at 74. As the Ninth Circuit has noted, the claim failed to mention "the name of the hospital or hospital personnel." *Rooney v. United States*, 634 F.2d 1238, 1243 (9th Cir. 1980). Similarly, in this case, the plaintiff's claim is devoid of reference to a hospital or even a visit to a doctor.

The Ninth Circuit in *Rooney* approved this holding in *Provancial*, stating that it was "correct as far as it [went]." *Rooney*, 634 F.2d at 1243. Therefore, under the authority of these two cases, this Court holds that plaintiff's suit for medical malpractice is barred for failure to file the necessary claim. *See also, Franz v. United States*, 414 F.Supp. 57 (D.Ariz. 1976).

2. *Proper Agency.*

Even if plaintiff had filed a sufficient administrative claim for a medical malpractice action, it appears the claim was not filed with the proper agency. The Department of Energy does not control the medical facility at El Toro Marine Base. As plaintiff's only administrative claim was filed with the Department of Energy, any claim for medical malpractice would fail on the additional ground that plaintiff failed to present her claim to the appropriate federal agency. *Broudy II*, 722 F.2d at 568.

For the above reasons, the government's motion for summary judgment was granted.

IT IS SO ORDERED

Dated: December 16, 1985

/s/ Laughlin E. Waters
Laughlin E. Waters
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

In re: CONSOLIDATED UNITED STATES ATMOSPHERIC TESTING LITIGATION,	
CHRISTINA KONIZESKI, et al., Plaintiffs-Appellants, v. LIVERMORE LABS, et al., Defendants-Appellees.	No. 85-2842 D.C. No. CV 84-0022 WWS et al. ORDER (Filed Aug. 25, 1987)
ALICE P. BROUDY, et al., Plaintiffs-Appellants, v. UNITED STATES OF AMERICA, Defendant-Appellee.	No. 86-5553 D.C. No. CV 79-2626 LEW

Before: ANDERSON, ALARCON, and HALL, Circuit Judges.

The panel as constituted in the above case has voted to deny the petition for rehearing and to reject the suggestion for a rehearing en banc.

The full court has been advised of the suggestion for en banc rehearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc, Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

TEXT OF 42 U.S.C. § 2212

§ 2212. Contractor liability for injury or loss of property arising out of atomic weapons testing programs

(a) Federal remedies applicable; exclusiveness of remedies; Federal employee status; procedure, limitations, and exceptions applicable

(1) The remedy against the United States provided by sections 1346(b) and 2672 of Title 28, or by the Act of March 9, 1920 (46 U.S.C. 741-752 and 781-790), as appropriate, for injury, loss of property, personal injury, or death shall apply to any civil action for injury, loss of property, personal injury, or death due to exposure to radiation based on acts or omissions by a contractor in carrying out an atomic weapons testing program under a contract with the United States.

(2) The remedies referred to in paragraph (1) shall be exclusive of any other civil action or proceeding for the purpose of determining civil liability arising from any act or omission of the contractor without regard to when the act or omission occurred. The employees of a contractor referred to in paragraph (1) shall be considered to be employees of the Federal Government, as provided in section 2671 of Title 28, for the purposes of any such civil action or proceeding; and the civil action or proceeding shall proceed in the same manner as any action against the United States filed pursuant to section 1346(b) of such Title and shall be subject to the limitations and exceptions applicable to those actions.

(b) Delivery of process to Attorney General; removal of cases from State courts; certification of contractor status

A contractor against whom a civil action or proceeding described in subsection (a) of this section is brought shall promptly deliver all processes served upon that contractor to the Attorney General of the United States. Upon certification by the Attorney General that the suit against the contractor is within the provisions of subsection (a) of this section, a civil action or proceeding commenced in a State court shall be removed without bond at any time before trial by the Attorney General to the district court of the United States for the district and division embracing the place wherein it is pending and the proceedings shall be deemed a tort action brought against the United States under the provisions of section 1346(b), 2401(b), or 2402, or sections 2671 through 2680 of Title 28. For purposes of removal, the certification by the Attorney General under this subsection establishes contractor status conclusively.

(c) Actions covered; administrative claims; limitations

The provisions of this section shall apply to any action now pending or hereafter commenced which is an action within the provisions of subsection (a) of this section. Notwithstanding section 2401(b) of Title 28, if a civil action or proceeding pending on is dismissed because the plaintiff in such action or proceeding did not file an administrative claim as required by section 2672 of that Title, the plaintiff in that action or proceeding shall have 30 days from the date of the dismissal or two years from the date upon which the claim accrued, whichever is later, to

file an administrative claim, and any claim or subsequent civil action or proceeding shall thereafter be subject to the provisions of section 2401(b) of Title 28.

(d) "Contractor" defined

For purposes of this section, the term "contractor" includes a contractor or cost reimbursement subcontractor of any tier participating in the conduct of the United States atomic weapons testing program for the Department of Energy (or its predecessor agencies, including the Manhattan Engineer District, the Atomic Energy Commission, and the Energy Research and Development Administration). Such term also includes facilities which conduct or have conducted research concerning health effects of ionizing radiation in connection with the testing under contract with the Department of Energy (or any of its predecessor agencies).

(Pub.L. 98-525, Title XVI, § 1631, Oct. 19, 1984, 98 Stat. 2646.)

(2)

Supreme Court, U.S.
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CLERK

No. 87-953

In the Supreme Court of the United States

OCTOBER TERM, 1987

CHRISTINA KONIZESKI, ET AL., PETITIONERS

v.

LIVERMORE LABS, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether 42 U.S.C. (Supp. III) 2212, which provides that the remedies available against the United States are the exclusive remedies for claims arising out of the federal government's atomic weapons testing program, violates separation of powers principles or the Takings Clause of the Fifth Amendment.

2. Whether the discretionary function exception to the Federal Tort Claims Act, 28 U.S.C. 2680(a), bars claims that inadequate precautions were taken to protect the participants in the atomic weapons tests and that test participants were not later adequately warned of the possible dangers to which they had been exposed.

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In the Supreme Court of the United States

OCTOBER TERM, 1987

No. 87-953

CHRISTINA KONIZESKI, ET AL., PETITIONERS

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-41) is reported at 820 F.2d 982. The opinion of the United States District Court for the Northern District of California in *In re Consolidated United States Atmospheric Testing Litigation* (*Konizeski*) (Pet. App. 42-89) is reported at 616 F. Supp. 759. The opinion of the United States District Court for the Central District of California in *Broudy* v. *United States* (Pet. App. 90-95) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 22, 1987. A petition for rehearing with suggestion for rehearing en banc was denied on August 25, 1987 (Pet. App. 96-97). On November 19, 1987, Justice O'Connor extended the time for filing a petition for a writ of certiorari

to December 8, 1987, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Section 1631 of the Department of Energy National Security and Military Applications of Nuclear Energy Authorization Act of 1985, Pub. L. No. 98-525, 98 Stat. 2646, codified at 42 U.S.C. (Supp. III) 2212, provides that, "for injury, loss of property, personal injury, or death due to exposure to radiation based on acts or omissions by a contractor in carrying out an atomic weapons testing program under a contract with the United States" (§ 2212(a)(1)), the remedies available against the United States shall be "exclusive of any other civil action or proceeding for the purpose of determining civil liability" (§ 2212(a)(2)). The statute further provides that the employees of such contractors "shall be considered to be employees of the Federal Government" within the meaning of the Federal Tort Claims Act (FTCA) (§ 2212(a)(2)), that suits filed against such contractors "shall be deemed a tort action brought against the United States" under the FTCA (§ 2212(b)), and that such suits "shall proceed in the same manner as any action against the United States" under the FTCA (§ 2212(a)(2)).

Congress enacted Section 2212 in response to the "flood of litigation" brought against contractors that "participated in the government's nuclear weapons tests." S. Rep. 98-500, 98th Cong., 2d Sess. 376-377 (1984).[1] Having been framed with "the obvious purpose of escaping the well-known limits on the government's waiver of sovereign

[1] As of December 14, 1987, contractors had been named as defendants in 58 cases, brought by over 3,000 plaintiffs, seeking damages totalling in excess of $4.9 billion.

immunity" (Pet. App. 15),[2] such suits were a source of serious practical and legal problems because the government was contractually committed to indemnify most contractors (see S. Rep. 98-500, *supra*, at 376) and because the suits "constitute[d] a threat to the continued participation of the private contractors in the nuclear weapons program because the contractors fear[ed] the bad publicity generated by the suits" (Pet. App. 19).[3]

Section 2212 "clarif[ied] the status" of contractors involved in nuclear weapons testing to reflect Congress's belief that these contractors are "unique" (S. Rep. 98-500, *supra*, at 374). "[T]hese contractors," Congress found, "were utilized by the United States as instruments of national policy to assist in [an] entirely governmental task" (*id.* at 375). By statute, "only" the government can perform nuclear weapons research and development and test nuclear devices (*id.* at 375-376). Thus, "[o]nly the Government set[] the policy, ma[de] the decisions, and con-

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[2] Suits for injuries allegedly resulting from nuclear weapons tests were uncommon until the late 1970s. Initially, such suits invariably were directed against the government. However, commentators quickly recognized that the defenses available to the government under the FTCA were "more than likely to create insurmountable barriers to recovery." Note, *The Nevada Proving Grounds: An Asylum for Sovereign Immunity?*, 12 Sw. U.L. Rev. 627, 629 (1981). The first suggestion that contractors might be sued instead of the government proposed that strategy as a means of circumventing the FTCA's limitations. See Favish, *Radiation Injury and the Atomic Veteran: Shifting the Burden of Proof on Factual Causation*, 32 Hastings L.J. 933, 962-963 n.109 (1981).

[3] See *Litigation Relating to Atomic Testing: Hearing Before the Subcomm. on Administrative Law and Governmental Relations of the House Comm. on the Judiciary*, 98th Cong., 1st Sess. 42-45, 48-49 (1983) (testimony of George Dacey, President, Sandia National Laboratories, and William Degarmo, Laboratory Counsel, Lawrence Livermore National Laboratory).

trol[led] activities and circumstances regarding atomic weapon research, development, and testing" (*id.* at 375). Moreover, "[e]ach nuclear test that has been made since 1946 has been made under the statutory direction of Congress[,] * * * has been approved, before the fact, by the President[,] * * * [and] has been under the direct supervision of government officials" (*id.* at 376). While contractors "have provided scientific, engineering and technical support for nuclear tests carried out by the government," they "did not order the tests to be performed; they did not set the times or places for the tests; nor did they direct military or civilian government personnel to participate in them" (*ibid.*). Therefore, Congress found (*ibid.*), there was no "question[] that these contractors were acting as the de facto instruments of the United States Government in carrying out a governmental purpose." It concluded that "[f]or the purposes of civil litigation arising from atomic weapons testing, the proper party defendant is the government—not these contractors." S. Rep. 98-174, 98th Cong., 1st Sess. 374 (1983).

2. This case involves more than forty suits that were consolidated in the United States District Court for the Northern District of California and one suit that was brought in the United States District Court for the Central District of California and consolidated with the other suits on appeal to the Ninth Circuit. Petitioners assert claims for personal injury or wrongful death caused by exposure to radiation resulting from the detonation of atomic weapons. They are primarily persons (or the personal representatives of persons) who participated in atomic weapons tests conducted by the United States between the end of World War II and the adoption of the Partial Nuclear Test Ban Treaty in 1963; three claims are based on exposure to radiation in Hiroshima and Nagasaki. Most of

the persons exposed to radiation were members of the military at the time; four participated in atomic weapons tests as civilian employees of the government or of government contractors and one participated in tests first as a serviceman and then as a civilian. Pet. App. 42-44 nn.1 & 2; *id.* at 90. Eleven of the suits named the federal government as defendant, 28 suits were brought in state court against government contractors, and four suits named both the federal government and contractors as defendants.

a. The suits filed against contractors in state court were removed to the United States District Court for the Northern District of California. The court consolidated all suits pending before it involving claims arising out of atomic weapons tests, and, pursuant to Section 2212, substituted the government as defendant in cases brought against government contractors.

The district court rejected petitioners' arguments that Section 2212 is unconstitutional. It noted (Pet. App. 54) that, "[i]n adopting this legislation, Congress broke no new ground," comparing Section 2212 to the Swine Flu Act (42 U.S.C. (1976 ed.) 247b(k) (repealed 1978)), the Federal Drivers Act (28 U.S.C. 2679(b)-(e)), and various statutes making the FTCA the exclusive remedy for claims arising out of the conduct of government medical personnel (10 U.S.C. (& Supp. IV) 1089; 38 U.S.C. 4116; 42 U.S.C. 233). Indeed, the court concluded (Pet. App. 55) that "these consolidated actions present perhaps the most compelling case for substituting the government as the sole defendant" since they involve "activities conducted under the closest control of the government, undertaken on authority from the President, capable of being performed solely by the government and inextricably interwoven with national security." "A question as to the validity of the Act

arises," the court observed (*ibid.*), "solely because it applies to pending actions." See § 2212(c).

The district court rejected petitioners' argument that, insofar as it applies to pending cases, Section 2212 violates the Takings Clause of the Fifth Amendment. It pointed out that the relevant property interest—a pending civil suit—is "inchoate" and "contingent on successful prosecution to judgment" (Pet. App. 56-57). "That a cause of action may * * * be impaired or lost before final judgment" due to intervening legislation, the court stated (Pet. App. 57), has been "beyond question" ever since this Court's decision in *United States* v. *The Schooner Peggy*, 5 U.S. (1 Cranch) 102 (1801). Application of Section 2212 to pending claims does not violate the Takings Clause, the district court concluded (Pet. App. 65 (citations omitted)), since "the tort claims asserted here lack 'investment-backed expectations,' " are "contingent by their nature," and "arise in a field in which the law remains to be developed." In any event, the court concluded (*ibid.*), Section 2212 "does not abrogate [petitioners'] claims but subjects them to the tort claims procedure which the [petitioners] could reasonably expect might be applied."

Turning next to petitioners' argument that separation of powers principles preclude application of Section 2212 to claims that were pending on the date of its enactment, the district court held (Pet. App. 66) that, "[s]ince the Act neither directs the courts to make a certain finding of fact nor requires them to apply an unconstitutional law, the separation of powers doctrine is not offended." Section 2212, the court reasoned (*ibid.*), "does not withdraw jurisdiction from the federal courts, does not deprive a party of the benefit of a judgment, and does not mandate the outcome of particular cases. It substitutes remedies but

it leaves the application of the rules of law, including any defenses, for judicial determination."[4]

The district court then dismissed all of the suits consolidated before it on the ground that the claims are barred by the discretionary function exception to the Federal Tort Claims Act, 28 U.S.C. 2680(a).[5] The district court concluded (Pet. App. 70-73) that, under *Dalehite* v. *United States*, 346 U.S. 15 (1953), where this Court held that the exception barred suits alleging that a disastrous explosion had been due to inadequate plans for the handling and shipping of fertilizer, petitioners' claims that inadequate safety precautions were taken at the atomic weapons test sites were plainly barred. With respect to the claims that the government breached a duty to warn of the hazards to which the test participants had been exposed, the court noted that in 1977 the government established a notification and examination program for test participants. The initial cost of the program was $6 million per year, the court observed (Pet. App. 77), and the program involved "difficult judgments balancing the magnitude of the risk from radiation exposure—of which there was only frag-

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[4] The district court also rejected arguments, now abandoned by petitioners, that Section 2212 violates the substantive and procedural components of the Due Process Clause and the Seventh Amendment. Pet. App. 55 n.6, 57 n.8, 63-64.

[5] In the alternative, the district court held that all of the suits arising out of exposure to radiation of servicemen are barred by the rule of *Feres* v. *United States*, 340 U.S. 135 (1950) (Pet. App. 81-87); that the suits arising in Japan, the Marshall Islands, or at Christmas Island are barred by the FTCA's foreign country exception, 28 U.S.C. 2680(k) (Pet. App. 87); and that the suits arising out of exposure to radiation in Hiroshima or Nagasaki at the end of World War II are barred by the FTCA's combatant activities exception, 28 U.S.C. 2680(j) (Pet. App. 88). These holdings were not addressed by the court of appeals. See Pet. App. 39 n.20.

mentary knowledge—against the risks and burdens of a public program." "The conclusion is inescapable," the court found (*id.* at 79), that the discretionary function exception precludes claims challenging the government's failure to undertake such a program sooner than it did.

b. Petitioner Broudy's wrongful death suit, which contended that the government had breached a post-discharge duty to warn her decedent of radiation dangers to which he had been exposed as a military participant in atomic weapons tests, was filed in the United States District Court for the Central District of California. Pet. App. 90-91. Adopting the reasoning of the opinion in the consolidated Northern District cases, the district court held (*id.* at 92-93) that the discretionary function exception barred that claim.

c. The court of appeals consolidated the appeals and affirmed (Pet. App. 1-41). For the most part, it adopted verbatim what it described (*id.* at 3) as the "well reasoned" opinion of the United States District Court for the Northern District of California. In addition, the court of appeals "added and adopted portions" (*id.* at 3 n.2) of the First Circuit's opinion in *Hammond* v. *United States*, 786 F.2d 8 (1986), which also rejected a constitutional challenge to Section 2212. See Pet. App. 17 ("adopt[ing] the *Hammond* court's cogent due process analysis").

A petition for rehearing and suggestion for rehearing en banc drew no votes.

ARGUMENT

1. Petitioners' primary contention is that Section 2212 cannot constitutionally be applied to lawsuits that were pending on the date of its enactment.[6] Relying on separa-

[6] This argument, of course, has no applicability to the 11 suits in which the government was originally named as the defendant.

tion of powers principles and the Takings Clause, petitioners argue that Congress cannot enact legislation impairing a legal claim once a complaint has been filed, and that the "purpose and effect" (Pet. 13) of Section 2212 is to do just that. Petitioners' argument is wholly without merit, and has been rejected by the two circuits—indeed, by all of the lower court judges—that have considered it.

a. To begin with, Congress clearly intended Section 2212 to apply to lawsuits that were pending on the date of its enactment, as well as to suits commenced thereafter. See 42 U.S.C. (Supp. III) 2212(c).[7] Section 2212 was enacted to "cause all litigation involving the atomic weapons testing program, including suits now filed against contractors, to be maintained against the United States under the substantive and procedural requirements of the FTCA" (S. Rep. 98-500, *supra*, at 375). Petitioners argue that Congress transgressed separation of powers principles by "chang[ing] the rule in pending cases" because the "ultimate consequence" of relegating their claims to the remedy provided under the FTCA "was to preclude any compensation" (Pet. 15). By couching their argument in separation of powers terms, petitioners presumably hope to distinguish the numerous cases in which this Court has stated that it is "clearly established that '[a] person has no property, no vested interest, in any rule of the * * * law' " (*Duke Power Co.* v. *Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 88 n.32 (1978), quoting *Second Employers' Liability Cases*, 223 U.S. 1, 50 (1912), quoting *Munn* v. *Illinois*, 94 U.S. 113, 134 (1876)) and that the

[7] Since most of the lawsuits likely to be affected by Section 2212 have arisen, or are expected to arise, out of atomic weapons tests conducted more than 25 years ago (see S. Rep. 98-500, 98th Cong., 2d Sess. 376 (1984)), it would make little sense to limit the applicability of Section 2212 to suits filed after the date of its enactment.

"mere commencement of [a] suit" does not "operate to deprive government of the power to enact curative statutes which, if the actions had not been brought, would have been unquestionably valid" (*United States* v. *Heinszen & Co.*, 206 U.S. 370, 387 (1907)). See also *McCullough* v. *Virginia*, 172 U.S. 102, 123-124 (1898) ("[l]egislation may act on subsequent proceedings, [and] may abate actions pending, but when those actions have been passed into judgment the power of the legislature to disturb the rights created thereby ceases").

Petitioners base their separation of powers argument on *United States* v. *Klein*, 80 U.S. (13 Wall.) 128 (1871). The issue in *Klein* was whether Congress could divest the federal courts of jurisdiction over a suit seeking compensation for property that had been seized during the Civil War. By statute, the claimant in such a suit was required to prove that he had remained loyal to the Union, and, in an earlier opinion, this Court had held that such loyalty could be proved by a Presidential pardon. However, after the plaintiff in *Klein* had received a favorable judgment in the Court of Claims, Congress passed legislation defining acceptance of a pardon as proof of disloyalty and directing the courts to dismiss for want of jurisdiction any claim based on a pardon. On appeal, this Court refused to apply the new legislation, holding that it "passed the limit which separates the legislative from the judicial power" and, by "impairing the effect of a pardon, * * * infring[ed] the constitutional power of the Executive" (80 U.S. (13 Wall.) at 147).

Contrary to petitioners' apparent belief (see Pet. 18), *Klein* "should surely not be read as casting doubt on the ancient principle, clear since the decision in [*The Schooner Peggy, supra*], that the courts are obligated to apply law (otherwise valid) as they find it at the time of final judg-

ment." P. Bator, P. Mishkin, D. Shapiro & H. Wechsler, *The Federal Courts and the Federal System* 316 n.4 (2d ed. 1973). Rather, *Klein* simply "establish[ed] the welcome if unsurprising proposition that Congress's power to limit federal court jurisdiction * * * is subject to limitations found elsewhere in the Constitution." D. Currie, *The Constitution in the Supreme Court, The First Hundred Years* 311 (1985). Thus, *Klein* teaches that legislation may be objectionable "in terms of the doctrine of separation of powers" either because it "impermissibly has disturbed the finality of a judicial decree by rendering * * * earlier judgments in [a] case mere advisory opinions" or because it has "prescrib[ed] a rule of decision that left the court no adjudicatory function to perform." *United States* v. *Sioux Nation of Indians*, 448 U.S. 371, 391-392 (1980); see generally Young, *Congressional Regulation of Federal Courts' Jurisdiction and Processes:* United States *v.* Klein *Revisited*, 1981 Wis. L. Rev. 1189.

In this case, the application of Section 2212 to claims that were pending when it was enacted raises no separation of powers concerns. As the court below found (Pet. App. 22), "Section 2212 does not withdraw jurisdiction from the federal courts, does not deprive a party of the benefit of a judgment, and does not mandate the outcome of particular cases." Unlike the situation in *Klein*, the statute that petitioners challenge "substitutes remedies but it leaves the application of the rules of law, including any defenses, for judicial determination" (*ibid.*). The independence of the federal courts plainly is not threatened where, as here, new laws are entrusted to their application. See *Dames & Moore* v. *Regan*, 453 U.S. 654, 685 (1981). Accordingly, if, as petitioners argue, a constitutional question arises because of the effect that Section 2212 has on pending suits, that question must find its source in con-

stitutional limitations which operate independently of separation of powers principles.

b. Petitioners purport to find such a constitutional limitation in the Takings Clause, arguing (Pet. 19) that applying Section 2212 to their pending lawsuits "effects a taking of Petitioners' property without compensation." There is no "set formula for identifying a 'taking,' " but this Court has "identified three factors which have 'particular significance': (1) 'the economic impact of the regulation on the claimant'; (2) 'the extent to which the regulation has interfered with distinct investment-backed expectations'; and (3) 'the character of the governmental action.' " *Connolly* v. *Pension Benefit Guaranty Corp.*, 475 U.S. 211, 224-225 (1986) (quoting *Penn Central Transportation Co.* v. *New York City*, 438 U.S. 104, 124 (1978)). The court below properly made the " 'essentially ad hoc, factual inquir[y]' " required in evaluating these factors, and correctly concluded that neither the "nature of the property right" here asserted nor the character of the "governmental action" supports the claim that Section 2212 effects a taking. Pet. App. 15 (quoting *Penn Central*, 438 U.S. at 124).

Initially, it must be noted that petitioners do not seriously contest (see Pet. 23-24) the court of appeals' conclusion (Pet. App. 15) that they had no "investment-backed expectations" in the "property"—petitioners' tort claims against the contractors—that Section 2212 allegedly "takes." Petitioners nonetheless insist (Pet. 19) that their causes of action were property and that (*id.* at 23) Section 2212 "has entirely destroyed the value" of their claims. But even if "a cause of action is a species of property," there can be no doubt that Congress may "eliminate * * * causes of action altogether." *Logan* v. *Zimmerman Brush Co.*, 455 U.S. 422, 428, 432 (1982). At least " 'until a final unreviewable judgment is obtained,' " a claim for damages

is "contingent." Pet. App. 14-15 (quoting *Hammond*, 786 F.2d at 12). This kind of "interest in anticipated gains has traditionally been viewed as less compelling than other property-related interests." *Andrus* v. *Allard*, 444 U.S. 51, 66 (1979). Moreover, "[i]t hardly need be said that predicting the outcome of any damage suit—both with respect to liability and the amount of damages—is hazardous." *United States* v. *Johnson*, No. 85-2039 (May 18, 1987), slip op. 7 n.9.[8] Coupled with the fact that the law is always subject to " 'amendments to achieve the legislative end' " (*Connolly*, 475 U.S. at 227, quoting *FHA* v. *The Darlington, Inc.*, 358 U.S. 84, 91 (1958)), it is clear that petitioners had nothing more than an inchoate " 'unilateral expectation' " in the claims they had asserted, which is insufficient to implicate the Takings Clause (*Ruckelshaus* v. *Monsanto Co.*, 467 U.S. 986, 1005 (1984) (quoting *Webb's Fabulous Pharmacies, Inc.* v. *Beckwith*, 449 U.S. 155, 161 (1980)).

We know of no case in which the effect of intervening legislation on a pending lawsuit has been deemed a taking.[9] Moreover, "[g]iven the propriety of the govern-

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[8] It may well be that petitioners' claims (or at least the claims of those petitioners who were servicemen) against the contractors are barred under the military contractor defense which has been recognized by many circuits. See, *e.g.*, *McKay* v. *Rockwell International Corp.*, 704 F.2d 444, 451 (9th Cir. 1983), cert. denied, 464 U.S. 1043 (1984). In *Boyle* v. *United Technologies Corp.*, No. 86-492 (argued Oct. 13, 1987), this Court currently has before it the question whether, and under what circumstances, military contractors should be protected by such a defense. Insofar as this defense is applicable, then, even assuming that a taking occurred, Section 2212 took nothing of value from petitioners. Since none of the courts below based their conclusions on the likelihood that petitioners' claims against the contractors would be barred (or even mentioned the military contractor defense), there is no reason to hold this case for *Boyle*.

[9] Petitioners' citation of *Ettor* v. *City of Tacoma*, 228 U.S. 148 (1913), is inapt. There the Court required a remedy for harm from a

mental power to regulate, * * * * * it would be surprising indeed to discover" that a takings issue has lurked unseen in past instances where a change in law has affected pending lawsuits (*Connolly*, 475 U.S. at 223). By comparing (Pet. 20) the suits they filed to the liens that were held to have been taken in *Armstrong* v. *United States*, 364 U.S. 40 (1960), petitioners inadvertently underscore a fundamental reason why their takings argument is misconceived: unlike a lien, the mere filing of a lawsuit gives a claimant no vested interest in "specific property" (*id.* at 44). Governmental action that extinguishes a pending lawsuit thus "takes" no property. Indeed, any other conclusion would produce an anomaly, since it is clear that Congress can create a " 'liability based on past acts,' " thus " 'upset[ting] otherwise settled expectations,' " without effecting a taking. *Connolly*, 475 U.S. at 223 (quoting *Usery* v. *Turner Elkhorn Mining Co.*, 428 U.S. 1, 15-16 (1976)).

Petitioners in fact concede (Pet. 26-27) that intervening legislation can constitutionally "change the rule of decision in accrued causes of action." Their attempt (*ibid.*) to limit this concession to situations in which such changes

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physical intrusion upon real property by ordering application of a statute authorizing suit which had been repealed after the physical intrusion at issue. The Court expressly distinguished the case from tort actions, such as this, stating: "In the instant case the action is neither for a tort, nor for a penalty, nor for a forfeiture, but for injury to property actually accomplished before the repeal of the law under which the street was graded which required compensation to be made" (228 U.S. at 157-158). Insofar as the intrusion in *Ettor* constituted a taking of property, it is clear, especially following this Court's decision in *First English Evangelical Lutheran Church* v. *County of Los Angeles*, No. 85-1199 (June 9, 1987), that compensation for that wrong was constitutionally required. There is no such constitutional requirement of compensation for torts such as those alleged by petitioners here.

"could reasonably have been anticipated," are "curative," or "merely substitute one remedy for another" fails to distinguish this case. Section 2212 plainly is "curative" legislation. It is perfectly clear that suits against parties other than the government alleging negligent performance of atmospheric atomic weapons tests are designed to circumvent the limitations on the immunity of the United States (see note 2, *supra*), and thus Section 2212 simply subjects petitioners "to the tort claims procedure which the [petitioners] could reasonably expect might be applied" (Pet. App. 15). Moreover, while it is true that *these* petitioners have found the FTCA remedy unavailing, Section 2212(a)(2) does substitute a remedy, a suit under the FTCA, for the claims against contractors that petitioners had asserted. And the discretionary function exception would *not* bar claims for "run-of-the-mine accidents" (*Dalehite* v. *United States*, 346 U.S. 15, 28 n.19 (1953)) for which the government's contractors may have been responsible.[10]

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[10] Petitioners correctly note (Pet. 8 n.5) that the doctrine of *Feres* v. *United States*, 340 U.S. 135 (1950), also applies to preclude the suits of those petitioners who were exposed to radiation while in military service, and that other FTCA exceptions will preclude various claims too. Whether such barriers to successful prosecution of an FTCA claim in fact make that remedy less generous than a suit against a contractor is questionable. See note 8, *supra*. In any event, Congress has enacted several pieces of legislation to provide compensation to veterans injured by in-service exposure to radiation. See Veterans' Dioxin and Radiation Exposure Compensation Standards Act, Pub. L. No. 98-542, 98 Stat. 2725; Veterans' Health Care, Training, and Small Business Loan Act of 1981, Pub. L. No. 97-72, § 102(a)(2), 95 Stat. 1047-1048; Veterans' Health Care Amendments of 1983, Pub. L. No. 98-160, § 601, 97 Stat. 1006-1008. Petitioners' complaint (Pet. 23 n.9) that they have been denied benefits under such programs simply reflects the fact that, even when judged under the lenient standards applicable to claims for veterans' disability benefits, there is insufficient scientific evidence to support the conclusion that participants in the atomic weapons tests were exposed to hazardous amounts of radiation. See S. Rep. 100-215, 100th Cong., 1st Sess. 91-110 (1987).

2. Petitioners also present the question whether the discretionary function exception, 28 U.S.C. 2680(a), was correctly applied in this case. However, petitioners note (Pet. 28) that this case "poses substantially the same legal issues * * * pertaining to the application of the discretionary function exception in the context of the United States atmospheric testing program" that were raised by the petition for a writ of certiorari in *Allen* v. *United States*, No. 87-316, and request (Pet. 28) "that this case be held for appropriate disposition in light of the outcome in that case." Since this Court denied the *Allen* petition on January 11, 1988, the appropriate disposition here in light of *Allen* is to deny the petition.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1987

CHRISTINA KONIZESKI, ET AL.

v.

LIVERMORE LABS, ET AL.

ALICE P. BROUDY

v.

UNITED STATES OF AMERICA

ON PETITION FOR
WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF AMICI CURIAE COMMITTEE OF ATOMIC BOMB SURVIVORS AND FRIENDS OF HIBAKUSHA IN SUPPORT OF PETITIONERS

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STATEMENT OF INTEREST

The Committee of Atomic Bomb Survivors ("CABS") is a California nonprofit corporation formed in 1972 to provide mutual support for the more than 1,000 American survivors of the Hiroshima and Nagasaki atomic bombings ("hibakusha"). Most of the survivors either were Americans trapped by the outbreak of World War II while visiting relatives or going to school in Japan or were Japanese citizens who married American servicemen after the war. Most American hibakusha are women and virtually all were still children (the youngest were in utero) when the bombs fell, engulfing the cities of Hiroshima and Nagasaki in a nightmare of fire and destruction. Most of CABS' efforts have focused on obtaining medical assistance for its members (the hibakusha receive no assistance from our government

for their extraordinary injuries) and participation in public education about the devastating consequences of nuclear war.

Friends of Hibakusha ("FOH") is a California nonprofit public benefit corporation created in 1981 to provide support to the American hibakusha, to preserve their legacy to humanity and to educate the public about the horrors of nuclear war. FOH is involved in educational projects for adults and children in the San Francisco Bay Area and also helps arrange for medical assistance to the hibakusha, including the coordination of a biennial visit of a delegation of Japanese doctors from Hiroshima, sponsored by the Japanese government, to perform free medical examinations for the hibakusha.

Both CABS and FOH are vitally interested in the issue of governmental responsibility for the victims of radiation exposure. Because of their deeply traumatic experiences with nuclear warfare, the hibakusha feel a strong kinship with and support for all such victims. CABS and FOH strongly believe that all persons subjected to intentional or negligent exposure to nuclear radiation should be entitled to compensation for their resulting injuries.

INTRODUCTION

CABS and FOH respectfully submit that the advent of the nuclear age has fundamentally changed the world in which we live and, in particular, the approach nations must adopt in shaping public policy. As a result of the atomic bombings of Hiroshima and Nagasaki on August 6 and 9, 1945, nations must now

confront a new set of legal and political assumptions unforeseen before the advent of nuclear war. Indeed, the urgency of this task is far greater now than ever before since the combined nuclear arsenals of the superpowers dwarf the destructive power of the first atomic bombs as much as they, in their time, dwarfed the destructive power of conventional explosives. We are faced each day with the awful political and personal consequences of the dilemma we have created for ourselves.

Japan in particular has responded to the challenge of reexamining its responsibilities in view of the dangers to civilization posed by nuclear warfare and has accepted the enhanced duties which all nations, including and especially the major nations, must bear in the nuclear age. In particular, recognizing the

magnitude of the injuries suffered by those exposed to the Hiroshima and Nagasaki nuclear bombs, Japan provides a comprehensive program of medical care to all survivors of the bombings, although the American hibakusha must provide their own transportation to Japan in order to receive this treatment. As a result, Japan maintains research centers and an unequalled store of information on the effects of radiation exposure to which even the USSR turned for assistance after the Chernobyl disaster. CABS and FOH believe that the essential issue presented to our nation by the petitioners' case is the need to similarly recognize and accept the responsibilities attendant upon a major nation in the nuclear age.

As living witnesses to the holocaust of nuclear warfare, the hibakusha know

the terrible reality of the threat of global annihilation and immeasurable human suffering that is posed by modern nuclear weapons. In a profound and direct way, the hibakusha bear witness to this reality for all of us, making human and personal a debate that is most often shrouded in technical and abstract jargon. The hibakusha who miraculously survived the atomic explosions or who searched the devastated cities for their families, friends and loved ones experienced a hell on earth beyond most of our powers to imagine. It is from their vantage point as the first survivors of nuclear war between nations that the hibakusha appear here to address the issue of sovereign and discretionary immunity the government claims absolves it of responsibility for the peacetime

injuries inflicted upon the petitioners in this case.

The petitioners have explained to this Court how, following World War II, the United States conducted a series of atomic and hydrogen bomb tests which exposed an appalling number of Americans, who were entirely ignorant of the risks to which they were subject, to massive doses of nuclear radiation. Most have since died from cancers triggered by this exposure. In our view, the essential challenge to our country is to recognize the government's responsibility for these peacetime casualties of the cold war. However, although responsibility for the political decisions leading to those injuries may be among the most important questions our nation must face, petitioners have not sought to assign liability on this ground. Rather, consis-

tent with well settled common law principles, petitioners charge the private contractors and the government with liability for the negligence, indeed gross negligence, of the individuals responsible for the mandatory details of the implementation of the testing program.

Although none of the underlying purposes of the immunities the government asserts would be affected in the least by the imposition of liability and responsibility for the human suffering caused by the contractors' and government's negligence, the district court held that all activity in the course of the nuclear weapons testing program was protected by the discretionary function exception established by the Federal Tort Claims Act, 28 U.S.C. §2860(a). 616 F. Supp. 759 (N.D. Cal. 1985). Adopting the

district court's decision as its own, the Ninth Circuit affirmed the judgment of dismissal. 820 F. 2d 982 (9th Cir. 1987).

Amici recognize that this Court has given a broad reading to the discretionary function immunity under the Tort Claims Act. United States v. S.A. Empress De Viacao Aerea Rio Grandense (Varig Airlines), 467 U.S. 797 (1984) ("Varig"); Dalehite v. United States, 346 U.S. 15 (1953). In this case, however, the lower courts have immunized the government from liability for actions which stand far outside the limited protection this Court has recognized the discretionary function exception was intended to afford to the government's basic economic, political and social policy choices. By this brief, CABS and FOH respectfully suggest that the lower

courts' broad reading of the discretionary function exception is supported neither by its underlying purpose, as articulated by this Court's decisions, nor the democratic principles underlying our republic. Furthermore, the extent of the immunity afforded to the government by the lower courts' decisions is inconsistent with the protections afforded by the accepted norms of international law.

Accordingly, on these grounds, amici urge this court to grant certiorari in this exceedingly important case in order to correct the excessively broad reading the lower courts have given the discretionary function immunity. The negligent failure to establish and implement safe radiation exposure levels caused widespread suffering and death to those who were attempting to serve their country extraordinarily. Failing to take

responsibility for that suffering diminishes the principles and values underlying our belief in the people as sovereign. The far reaching immunization of the government conferred by the lower courts in this case was neither intended by Congress nor permissable under international law.

ARGUMENT

I. THE MODERN SOVEREIGN IMMUNITY DOCTRINE IS INCONSISTENT WITH BOTH ITS HISTORICAL ORIGINS AND OUR NATION'S UNDERLYING DEMOCRATIC PRINCIPLES.

The discretinary function exception derives in part from the underlying historical doctrine of sovereign immunity and cannot be understood apart from that context. Examination of its historical origins, however, reveals that, even in feudal England, the doctrine did not prevent relief against the Crown. Amici respectfully suggest that our modern

doctrine should be no less rigid in affording relief against the government.

By definition, the sovereign immunity doctrine protects the government from liability for injuries caused by its conduct even if a private person could be held liable for the same conduct. Unfortunately, modern courts have rigidly enforced the doctrine regardless of the acknowledged harshness which may result. Soriano v. United States, 352 U.S. 270, 276-277 (1957). This Court has repeatedly emphasized that the government may be sued only by its consent through an express and unequivocal waiver of its sovereign immunity. A waiver will not be implied and the terms of any such waiver will be strictly and narrowly construed in favor of the government. See Ruckelshaus v. Sierra Club, 463 U.S. 680, 686 (1983); United States v. Mitchell,

445 U.S. 535, 538 (1980); Soriano, 352 U.S. at 276; United States v. Sherwood, 312 U.S. 584, 586 (1941).

Ironically, the original medieval form of the doctrine did not produce the harsh results it does in our modern democracy. To the contrary, the doctrine allowed relief against the Crown in virtually all cases in which relief would have been available against a private person. See Holdsworth, **The History of Remedies Against the Crown**, 38 L.Q. Rev. 141, 142-143 (1922). While not subject to suit in his own courts, "the King was subject to the law . . . and was morally bound to do the same justice to his subjects as they could be compelled to do to one another." Id. at 144. Although addressed to its royal prerogative, the Crown could not properly deny a "petition of right" because it was, by definition,

based on legal claims recognized among the Crown's subjects. Id. at 148-150. As Holdsworth has observed:

> "To a petition of right there must always be a reply: 'Let right be done,' . . . [T]hough the King could rightfully refuse to grant a petition of grace, he could not rightfully refuse to do what justice required when judgment had been got on a petition of right." Id. at 149.

Significantly, throughout its history the petition remained a flexible remedy against the Crown whose scope evolved with the changing concepts of legal right based on "the principle that it ought to lie whenever the subject could show a legal right to redress." Id. at 148, 156, 163, 288. As Lord Atkins observed in Pawlett v. Attorney General, Hadres 465, 145 Eng. Rep. 550, 552 (1668):

> "The party ought to be relieved against the King, because the King is the

> fountain and head of justice and equity; and it shall not be presumed that he will be defective in either. And it would derogate from the King's honour to imagine that what was equity against a common person, should not be equity against him."

Since English common law has long afforded a remedy against the Crown for legal claims which would lie against a commoner, there is no historical basis upon which to limit the further development of actions against the government for redress of claims. Holdsworth, supra at 293-296; see also Bouchard, **Government Liability in Tort**, 34 Yale L.J. 1, 2 (1924). To conclude otherwise would, as Holdsworth recognized, effect "an obvious failure of justice." Holdsworth, supra at 294. In this case, application of the doctrine of sovereign immunity, in its aspect as the discretionary function

immunity, imposes the very injustice Holdsworth anticipated.

Because the sovereign immunity doctrine is both harsh in fact and unjust in principle, the doctrine has long been criticized as an unjust anachronism. Holdsworth, supra; Bouchard, supra. Indeed, that the original doctrine appears less harsh than its modern descendent is especially tragic, for the modern doctrine is fundamentally antithetical to our belief that a free citizenry, not a privileged elite, is the true sovereign and that the democratic republic guaranteed by the Constitution must be ultimately accountable to that citizenry. In this connection, the maxim that the king can do no wrong, which reflects one underlying tenet of the immunity, ironically appears to have originally

meant that the king was not privileged to do wrong. Bouchard, supra at 2.

Even if the doctrine of sovereign immunity is too entrenched to be altered without Congressional action, this Court must interpret its scope in the light of its historical origins and the anomaly of its continued viability. Countering the license conferred by the immunity is the more basic principle that justice is best served by the assignment of responsibility for legally cognizable injuries. See Westfall v. Erwin, ___ U.S. ___ (1988).

In this case, petitioners have alleged that the contractors' failure to implement safety measures meeting the mandatory standards for radiation exposure adopted by the government, which failure was not intended to be protected by any governmental immunity, subjected

them or their loved ones to debilitating pain, psychological stress and lingering deaths, a grim reality with which the hibakusha are all too familiar. In the interest of justice, nothing in the doctrine of sovereign immunity, even in its feudal aspect, demands that the government be absolved of responsibility for such conduct.

II. THE LOWER COURTS' APPLICATION OF THE DISCRETIONARY FUNCTION EXCEPTION IS INCONSISTENT WITH ITS INTENDED PURPOSES. PROPERLY CONSTRUED, THE EXCEPTION WOULD NOT IMMUNIZE THE ALLEGED GOVERNMENTAL NEGLIGENCE IN THIS CASE.

The essential purpose of the Federal Tort Claims Act was to broadly waive the government's sovereign immunity and, consistent with the historical limits of the immunity, render the government accountable in tort "in the same manner and to the same extent as a private

individual under like circumstances." 28 U.S.C. §2674; Varig, 467 U.S. 797, 808. As a limited exception to this general principle, the Act establishes an immunity from liability "based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty ... whether or not the discretion involved be abused." 28 U.S.C. §2680(a). In Dahelite, 346 U.S. 15, this Court appeared to read the exception broadly to include not only actions involving high level "policy judgment and decision," but also "the acts of subordinates in carrying out the operations of government in accordance with official direction." Id. at 35-36.

Believing that this case was controlled by Dalehite, as ostensibly interpreted by this Court in Varig, both the district court and the Ninth Circuit

held that the discretionary function exception precluded governmental liability for the negligent formulation and implementation of maximum radiation exposure levels in the nuclear weapons testing program. The lower courts, however, have misread the scope and purpose of the discretionary function exception and, in particular, this Court's view of Dalehite expressed in Varig.

Dalehite arose from a disasterous explosion of ammoninum nitrate fertilizer stored in cargo ships awaiting shipment as part of the government's program of rehabilitation of the European and East Pacific war zones following World War II. Plaintiffs charged the government with negligence in the cabinet level decision to initiate the fertilizer delivery project, and in the government's alleged

failures to test the fertilizer for its explosive potential, to develop proper manufacturing plans and to police the dockside storage and loading of the fertilizer. Rejecting petitioners' claims, this Court concluded that the program in its entirety was protected by the discretionary function exception. Observing that the focus of the exception is on the decisions of the "executive or administrator," the Court further concluded that the exception also protected acts, apparently regardless of how ministerial, taken in carrying out the basic policy decision:

> "[T]he 'discretionary function or duty' that cannot form a basis for suit under the Tort Claims Act includes more than the initiation of programs and activities. It also includes determinations made by executives or administrators in establishing plans, specifications or schedules of operations. Where there is room for policy judgement and decision there is discretion. It necessarily follows that acts of subordinates in carrying out the

> operations of government in accordance with official directions cannot be actionable." 346 U.S. at 35-36.

In Varig, 467 U.S. 797, thirty years after Dalehite, this Court sought to clarify the scope of the discretionary function exception to the general principle of liability under the Tort Claims Act. Contrary to the lower courts' apparent understandings in this case, however, while Varig accepted much of Dalehite's analysis of the legislative history of the exception, this Court did not adopt the excessively broad view of the immunity expressed in Dalehite. Thus, while Varig acknowledged that the exception cannot be precisely defined, this Court nonetheless recognized that "it is possible to isolate several factors useful in determining when the acts of a government employee are

protected from liability by §2860(a)." Id. at 813. Observing that the focus of the inquiry is upon the "nature of the conduct, rather than the status of the actor," the Court explained the essential principle informing Congress' recognition of the discretionary function exception:

> "Congress wished to prevent judicial 'second-guessing' legislative and administrative decisions grounded in social, economic and political policy through the medium of an action in tort. By fashioning an exception for discretionary governmental functions. . . . Congress took 'steps to protect the government from liability that would seriously handicap efficient government operations.'" (Emphasis added.) Id. at 813-814.

Varig, therefore, did not hold or intimate that all lower level actions taken in furtherance or implementation of a discretionary program can also be characterized as discretionary. To the contrary, most lower level actions are

ministerial and are precisely those which may be, and are commonly, tested by a standard of common law negligence. The essential purpose of the Tort Claims Act is to render the government liable as a private person for just such conduct.

In a closely related context, this Court has recently unanimously reaffirmed that federal immunities should not lightly be established and should be narrowly tailored to serve only their legitimate purposes. Westfall v. Erwin, ___ U.S. ___ (1988). Recognizing that the immunities "come at a great cost" and "contravene[] the basic tenet that individuals be held accountable for their wrongful conduct," this Court held that absolute immunity "is justified only when 'the contributions of immunity to effective government in particular contexts outweigh the perhaps recurring

harm to individual citizens." Id., quoting from Doe v. McMillan, 412 U.S. 306, 320 (1973). Specifically, concluding that the challenged conduct of federal officials must be discretionary to be entitled to immunity, this Court observed:

> "The central purpose of official immunity, promoting effective Government, would not be furthered by shielding an official from state-law tort liability without regard to whether the alleged tortious conduct is discretionary in nature. When an official's conduct is not the product of independent judgment, the threat of liability cannot detrimentally inhibit that conduct. It is only when officials exercise decisionmaking discretion that potential liability may shackle 'the fearless, vigorous, and effective administration of policies of government.' Because it would not further effective governance, absolute immunity for non-discretionary functions finds no support in the traditional justification for official immunity." (Emphasis added.) Id., quoting Barr v. Mateo, 360 U.S. 564, 571 (1959).

Furthermore, in rejecting the petitioners' contention that such discretion may be "minimal," this Court also declared:

> "We reject such a wooden interpretation of the discretionary function requirement. Because virtually all official acts involve some modicum of choice, petitioners' reading of the requirement would render it essentially meaningless.... [P]etitioners' approach ignores the balance of potential benefits and costs of absolute immunity under the circumstances and thus loses sight of the underlying purpose of official immunity doctrine. See Doe v. McMillan, 412 U.S., at 320. Conduct by federal officials will often involve the exercise of a modicum of choice and yet be largely unaffected by the prospect of tort liability, making the provision of absolute immunity unnecessary and unwise." Id.

Indeed, this Court has recently granted certiorari to consider the appropriate scope of the discretionary function exception. Berkovitz v. United States, 822 F.2d 1322 (3d Cir. 1987),

cert. granted, 56 U.S.L.W. 3459 (U.S. Jan. 11, 1988) (No. 87-498). In that case, the Third Circuit, relying on an excessively broad view of Varig, held that the exception immunized the alleged negligent licensing of a polio vaccine in violation of FDA regulations requiring the manufacturer to show that the vaccine complied with the regulatory standards. The majority apparently believed that Varig adopted Dalehite's apparent conclusion that all "non-discretionary operational level acts and omissions taken in furtherance of planning level discretionary decisions" were immune. Id. at 1329. As Judge Higgenbotham observed in dissent, by affording immunity to the FDA's implementation of the requirements of its own regulations, the majority "distorts the discretionary function exception" and "expanded the ...

exception beyond the boundaries of any case reported to date." Id. at 1332, 1334.

Wherever the line might be drawn, the allegations in the instant case place liability well outside the protections offended by the limited discretionary function exception. In this case, petitioners do not base their charges on the government's underlying political decision to engage in nuclear weapons testing. Rather, petitioners contend that, even in the light of information then available, the contractors failed to implement the safety measures required to meet the standards for radiation exposure the government adopted for the tests The statutory authorization for the nuclear weapons testing program required the government to establish safe standards for the military. The contractors were

under a mandatory duty to prepare and implement a radiation safety program to assure these standards were met.

These actions cannot properly be construed either to constitute a "social, economic or political policy" decision falling within the discretionary function exception explained in Varig or to involve the "independent judgment" or "decisionmaking discretion" essential to the "fearless, vigorous and effective administration of policies of government" which concerned this Court in Westfall. To do so would allow the exception to swallow the rule in any case where the underlying program was protected by the discretionary function exception. The only reason for the discretionary function immunity is to protect the process by which the basic policy decisions essential to the operation of

government are formulated. In the interest of justice, therefore, those government actions which are not fundamental policy decisions should not be immunized from liability.

The lower courts' reliance on the military commander's hypothetical authority to alter the mandatory standards for maximum radiation exposure is entirely misplaced. Not only is there no evidence that petitioners have challenged any such decision but to protect any such decision would be to immunize intentional experimentation with the lives of the military and civilian participants in the program, their families and perhaps generatons to come. Such experimentation, if it occurred, would be a crime against humanity. United States v. Brandt (The Medical Case), 2 Trials of War Criminals Before

The Nuremberg Military Tribunals Under Control Council Law No. 10, pp. 181-182 (1949); United States v. Stanley, 483 U.S. ___, 97 L.Ed. 2d 550, 569 (O'Connor, J., concurring and dissenting), 570-573 (Brennan, J., dissenting) (1987).

In sum, the discretionary function immunity is and should be a tightly limited exception to the general principle of governmental responsibility and accountability under the Tort Claims Act. This is especially true in our democratic system where the people, not the government, are the true soverigns. Thus, even if the exception has an independent modern rationale, this court must nevertheless recognize that the doctrine also derives from an historical notion of sovereign immunity rooted in a concept of the divine right of kings. As such, the doctrine is inherently inconsistent with

the principles of a democratic republic and should not be extended beyond its limited justification.

III. THE UNITED NATIONS' UNIVERSAL DECLARATION OF HUMAN RIGHTS OBLIGATES THE UNITED STATES TO COMPENSATE THE VICTIMS OF RADIATION EXPOSURE IN OUR NUCLEAR WEAPONS TESTING PROGRAMS.

Article VI, paragraph 2 of the United States Constitution provides that "all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land . . . ." As such, subject only to constitutional restrictions, a treaty is placed on an equal footing and is of like obligation and dignity as a Congressional enactment, and will supersede all prior inconsistent federal law. Whitney v. Robertson, 124 U.S. 190, 194-195 (1888); Reid v. Covert, 354 U.S. 1, 18 (1957). Although not expressly addressed in the

Constitution, the Supreme Court has also recognized that customary international law "is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending on it are duly presented for their determination." The Paquete Habana, 175 U.S. 677, 700 (1900). See generally Henkin, **The Constitution and United States Sovereignty: A Century of Chinese Exclusion and Its Progeny**, 100 Harv. L. Rev. 853, 863-886, 873 ["In the eighty-seven years since **The Paquete Habana**, the Court repeatedly has emphasized that international law is the law of the land, and it has given effect to principles of customary international law as the law of the United States."] (1987).

The Universal Declaration of Human Rights ("Universal Declaration"), adopted by the United Nations, has been recognized to be "the starting point in defining the contemporary context of customary international human rights law." See, e.g., Lillich, **The Role of Domestic Courts in Enforcing International Human Rights Law**, Guide to International Human Rights Practice (U. of Pa. Press 1984). Although the United States, which supported the Universal Declaration, has not characterized it as a treaty, commentators have virtually unanimously recognized that "the Declaration, as an authorizative listing of human rights, has become a basic component of international customary law, binding on all states, not only on members of the United Nations." Sohn, **The New International Law: Protection of**

the Rights of Individuals Rather Than States, 32 Am. U. L.Rev. 1, 17 (1982); Park, **Human Rights and Basic Needs: Using International Human Rights Norms to Inform Constitutional Interpretation**, 34 UCLA L. Rev. 1195, 1218-1220 (1987); Humphrey, **The International Bill of Rights: Scope and Implementation**, 17 Wm. & Mary L.Rev. 527, 529 (1976). As Professor Humphrey has observed:

> "[T]he adoption of the Declaration may well have been one of the greatest achievements of the United Nations. It provides the framework for the international recognition of those human rights and fundamental freedoms that were left undefined by the Charter. In the tradition of the Magna Carta, the American Declaration of Independence, the French Declaration of the Rights of Man, and other historic statements, the Universal Declaration of Human Rights enshrines on the international level a universally accepted philosophy of freedom for the twentieth century moving beyond the historic declarations by recognizing that civil and political rights can have

> little meaning without economic, social, and cultural rights. Its moral and political authority is equal to that of the Charter itself." Ibid.

The Declaration begins with a proclamation that it constitutes "a common standard of achievement for all people and all nations, to the end that every individual and every organ of society . . . shall strive . . . to promote respect for these rights and freedoms and by all progressive measures, national and international, to secure their universal and effective recognition and observance . . . ." Article III of the Universal Declaration posits that "everyone has the right to life, liberty and security of person." And most importantly, in Article VIII, the Universal Declaration states that "everyone has the right to an effective remedy by the competent national

tribunals for acts violating the fundamental rights granted him by the Constitution or by law."

As a signatory to the Universal Declaration, the United States has recognized and acknowledged the principles it establishes and affirms. As a consequence, the government has, and should have, a responsibility to "respect, promote and observe" its principles "representing the consensus of the international community. . . ." Park, 34 UCLA L.Rev. 1195, 1219; Henkin, 100 Harv. L. Rev. 853, 886.

Significantly, the United States has historically recognized these obligations. In 1956, in an exchange of notes with the Japanese Minister of Foreign Affairs and the American Ambassador, John M. Allison, the United States offered compensation to the Japanese fishermen

who were exposed to nuclear fallout from the tests conducted by the United States in the Marshall Islands. **Exchange of Notes Constituting An Agreement Between The United States of America and Japan Relating to The Settlement of Japanese Claims for Personal and Property Damages Resulting from Nuclear Tests in the Marshall Islands in 1954**, United Nations -- Treaty Series 198 (1955). Expressing the United States' deep concern over the injuries suffered by the Japanese fishermen in the course of the tests, the United States offered, "with reference to the question of legal liability, the sum of two million dollars for purposes of compensation for the injuries or damages sustained as the result of nuclear tests in the Marshall Islands in 1954." (Emphasis added.) Ibid. The offer was made "in full settlement of any and all

claims against the United States of America or its agents, nationals, or juridical entities, on the part of Japan and the nationals and juridical entities for any and all injuries, losses, or damage arising out of the said nuclear tests." Ibid.

Implicit in the government's action in offering compensation to the Japanese victims of the Marshall Island nuclear test was a recognition of their legitimate legal claim under international law for compensation for injuries caused as a result of our nuclear weapons testing program. It would indeed be bitterly ironic if the United States denied compensation to its own citizens for injuries resulting from exposure to nuclear radiation in the same testing programs. The civil, political and human rights recognized in the Universal

Declaration, which scholars and nations have recognized to have assumed the dignity of customary international law, should be applied in this case to recognize petitioners' legitimate claims and to provide compensation for the devastating injuries received as a result of the testing program.

CONCLUSION

The responsibility of our government to redress the injuries suffered by petitioners here lies at the heart of our identity as a free people. The notion that a government should not be held responsible for such injuries, or that a lack of responsibility is necessary to the effective operation of government, is, CABS and FOH respectfully submit, contrary to our most basic values and to the consensus on human rights in the international community. In view of the

historical and international contexts described above, the government's discretionary function exception should be construed narrowly and should not protect the gross negligence in the formulation and implementation of safety guidelines alleged here. CABS and FOH respectfully urge the Court to issue a writ of certiorari to the Ninth Circuit Court of Appeals in order to review and reverse the judgment in this case.

Dated: February __, 1988

Respectfully submitted,

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